Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MARLENE WHITTIER,
Petitioner,

v.

DANIEL KOBAYASHI, ERIC GOLDSTEIN,
ERIK PALACIO, ANDRE BRUNA, SEAN VISNERS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WILLIAM R. SCHERER, III
JANINE KALAGHER MCGUIRE
CONRAD & SCHERER LLP
633 South Federal Highway
Eighth Floor
Fort Lauderdale, Florida 33301
(954) 462-5500

TERRY COLLINGSWORTH
CONRAD & SCHERER LLP
1156 15th Street, N.W.
Suite 502
Washington, DC 20005
(202) 543-4001

ERWIN CHEMERINSKY
Counsel of Record
UNIVERSITY OF
CALIFORNIA, IRVINE
401 East Peltason Drive, 1095
Irvine, California 92697
(949) 824-7722
Echemerinsky@law.uci.edu

PAUL L. HOFFMAN
VICTORIA DON
SCHONBRUN DESIMONE
SEPLOW HARRIS & HOFFMAN LLP
723 Ocean Front Walk
Venice, California 90291
(310) 396-0731

Counsel for Petitioner

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (949) 720-1510

QUESTIONS PRESENTED

Whether in light of the precedents of this Court and the rulings of many other Circuits it is clearly established law that the suspicion of drugs and weapons in the home does not create a blanket exception excusing police from the Fourth Amendment requirement of knocking and announcing before entering a residence.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding are: Petitioner, Marlene Whittier, an individual; and Respondents, Daniel Kobayashi, Eric Goldstein, Erik Palacio, Andre Bruna and Sean Visners, all individuals.

Pursuant to Supreme Court Rule 29.6, petitioner states that there are no parent companies or non-wholly owned subsidiaries involved in this case.

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JURISDICTION

The three essentially identical per curiam opinions of the court of appeals were all entered on August 31, 2009. The denials to rehear en banc were entered on November 13, 2009; November 9, 2009; November 9, 2009. The jurisdiction of this Court is invoked pursuant to 18 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution, which states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be

> violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. The Events of August 5, 2005

During the early morning hours of August 5, 2005, 23-year old Anthony Diotaiuto ("Anthony") died from fatal gunshot wounds inflicted by the City of Sunrise Officers who had burst into his home. Anthony held down two jobs, helped support his mother, and attended community college. He and his mother had just purchased the home they lived in. Anthony had only a single mark on his record – a nonviolent marijuana possession misdemeanor accrued when he was sixteen.

A search warrant had been issued on the suspicion that Anthony was selling drugs from his residence. (App. A-4). Officers contended they loudly knocked and announced before entering, but this is disputed. (App. A-4–5). Neighbors said that they did not hear the police knock and announce; even three who stated that they were listening and certainly would have heard the alleged knock and announce said that they never heard this. (App. A-5) Furthermore, the police used an entry technique that is used only when there is the element of surprise; knocking and announcing would eliminate any

surprise before the entry.

The officers knew that Anthony had no record of violence. Moreover, a confidential informant specifically told the detective in charge of the underlying investigation that he knew Anthony well and did not think that Anthony would resist an arrest. As the officers approached Anthony's home, they had every reason to believe he was sleeping. The entry occurred at six in the morning and surveillance of the home revealed no lights or activity emanating from the home for over an hour prior to entry.

The only factor indicating any possible peril to the officers was their knowledge that Anthony lawfully owned both a properly licensed handgun and a shotgun (which did not require a license). On instruction by Sgt. Kobayashi, Officers Eric Goldstein and Erik Palacio forced Anthony's door with a Halligan tool and a battering ram. (App. D-6). Officer Andre Bruna then threw a flash-bang distraction device which detonated about six feet away from Anthony, who stood in the first room of the house (wearing only boxer shorts). (App. D-7). Anthony appeared shocked and disoriented. Sgt. Kobayashi entered the home simultaneously with Officer Kevin McDonnell and commanded Anthony to "get on the ground." *Id.* Officer Sean Visners did not give any commands so as not to add to what he described as the "chaos." Officer Palacio also observed Anthony facing the door looking stunned and frozen.

Anthony fled into his bedroom, pursued by Officers Visners and Bruna. (App. D-7). According to police, Anthony then retrieved his licensed handgun from his closet. *Id.* Officers Visners and Bruna opened fire and Diotaiuto fell back into the closet. *Id.* Within 15 to 20 seconds of police entering his home, Anthony Diotaiuto lay dead on the floor from approximately 25 gunshot wounds. Anthony did not once fire his own weapon during the entire incident. (App. A-5). The only controlled substance officers found inside the house was a small quantity of marijuana.

Anthony had no reputation for, or history of, violence whatsoever. The officers admitted that he appeared stunned, confused, and frightened. The moment officers breached the door they exposed Anthony to a flash-bang grenade, a device designed specifically to disorient, blind, deafen, and incapacitate combatants. (App. D-2, fn. 2). The officers admitted that the scene was chaotic. Anthony's behavior was consistent with that of a startled, blinded individual in fear for his life, desperately attempting to protect his home and family from unknown intruders. As a result of the very kind of response which would naturally and predictably stem from a no-knock entry, Anthony was shot to death moments later.

The members of the SWAT team were dressed in all black with black helmets. Anthony was asleep and was awakened by someone smashing in the door, throwing a flash-bomb next to him, and by eight people dressed all in black running at him and

shouting over each other. He was dead 15 to 20 seconds later. There was not sufficient time for Anthony to reasonably process what was happening during this chaos. A proper knock and announce was the only thing that could have saved his life under these circumstances.

The officers themselves never claimed that there were exigent circumstances justifying entering without knocking and announcing. They maintained that they had knocked and announced, though as mentioned above, there was strong evidence to the contrary.

B. Proceedings Below

Marlene Whittier, Anthony's mother, brought suit under 42 U.S.C. § 1983 in federal court as the personal representative of Anthony's estate, alleging that the officers violated Anthony's Fourth Amendment rights by forcibly entering without first knocking and announcing their presence and, as a result, shooting and killing him in his home.

The suit named as defendants Sgt. Kobayashi as team leader, Officers Goldstein and Palacio who breached the door, and Officers Bruna and Visners, who shot Anthony to death. Each of the officers made an identical motion for summary judgment on the grounds that no material factual dispute existed as to whether the knock and announce occurred and that they were protected by qualified immunity.

The district court issued three orders denying the motions for summary judgment on the knock and announce question. The district court held that the four subordinate officers did not merit qualified immunity for following their supervising officer's orders and that a material dispute existed as to the knock and announce. (App. D-16, E-17). Similarly, the district court denied qualified immunity on the knock and announce issue for defendant Sgt. Kobayashi, the commanding officers, since no neighbors had heard the knock and announce and three neighbors adamantly held that they were listening and would have heard it had it occurred. (App. F-12). The court also said that there were no exigent circumstances which would have eliminated the knock and announce requirement. (App. D-10, E-8, F-10). The district court also noted that no officers claimed exigent circumstances. (App. D-19, E-16,). The district court denied qualified immunity to the officers on the knock and announce, and the officers took an interlocutory appeal to the Eleventh Circuit. (App. D-16, E-17, F-12). In three per curiam opinions, the Eleventh Circuit reversed the district court and said that it was irrelevant that there was a factual dispute as to whether the police knocked and announced before entering. The Eleventh Circuit said that officers were protected by qualified immunity because the police were justified in entering without knocking and announcing based on their belief that there were drugs and weapons in the house. (App. A-8, B-7, C-7). Although its conclusion was based on qualified immunity, the Eleventh Circuit effectively created a blanket exception to the knock and announce requirement when there is the

"combination of drugs and firearms" based on the fact that "'[g]uns and violence go hand-in-hand with illegal drug operations." (App. A-8, B-7, C-7).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CLEAR SPLIT AMONG THE CIRCUITS, AN APPARENT CONFLICT WITH A PRIOR DECISION OF THIS COURT, AND AN ISSUE OF NATIONAL IMPORTANCE AS TO WHETHER THERE IS A BLANKET EXCEPTION TO THE KNOCK AND ANNOUNCE REQUIREMENT WHEN THE POLICE HAVE REASON TO BELIEVE THAT A WEAPON IS LAWFULLY PRESENT IN A DWELLING WHERE A SEARCH IS TO OCCUR.

A. This Court Should Grant Review To Resolve A Tension Between The Eleventh Circuit's Decision And Prior Rulings Of This Court.

This Court has been emphatic that the Fourth Amendment embodies the constitutional rule that unless there are exigent circumstances, police must knock and announce before entering a dwelling. *Wilson v. Arkansas*, 514 U.S. 927, 936 (1995) (the Fourth Amendment incorporates the common law requirement of the knock and announce). This is based on the importance given to the sanctity and

privacy of the home under the Fourth Amendment. *See, e.g., Kyllo v. United States*, 533 U.S. 27 (2001). Also, as the facts of this case illustrate, the knock and announce requirement provides crucial protection for the safety of both police and residents. When police enter without knocking and announcing, homeowners may well mistake them for dangerous invaders and act in self-defense accordingly.

There is a clear and obvious tension between the Eleventh Circuit's creating a blanket exception to the knock and announce requirement in cases where police believe that drugs and weapons are present, and this Court's decision in *Richards v. Wisconsin*, 520 U.S. 385, 388 (1997). Indeed, the Eleventh Circuit's conclusion of qualified immunity because of the absence of clearly established law is at odds with *Richards v. Wisconsin*. In that case, this Court rejected a blanket exception to knock and announce in all drug felony cases where officers did not possess "specific information about dangerousness, or the possible destruction of drugs in a particular case." *Id.* at 390.

Richards presented a set of facts very similar to the instant case. Officers received a warrant to search the motel room of Steiney Richards for "drugs and related paraphernalia." *Id.* at 388. Officers executed a no-knock entry, and seized drugs from his room. *Id.* at 389. The Wisconsin Supreme Court held that officers were never required to knock and announce where the warrant specified a search for evidence of delivery of drugs or possession with intent to deliver drugs." *Id.* at 390. Such facts, the

Wisconsin Court opined, were sufficient for an unrebuttable presumption of exigency.

The Wisconsin Court looked at criminal conduct surveys, newspaper articles, and other judicial opinions to decide that all felony drug crimes must necessarily involve "an extremely high risk of serious if not deadly injury to the police as well as the potential for the disposal of drugs by the occupants prior to entry by the police" and "concluded that exigent circumstances justifying a no-knock entry are always present in felony drug cases." *Id.* at 390. As the Eleventh Circuit did in the instant case, the Wisconsin Supreme Court created a low and generalized standard for exigency, determining that "police in Wisconsin do not need specific information about dangerousness, or the possible destruction of drugs in a particular case, in order to dispense with the knock-and-announce requirement in felony drug cases." *Id.*

The Eleventh Circuit used essentially identical reasoning in this case to find that the officers were protected by qualified immunity. It concluded that the police were protected by qualified immunity in entering without knocking and announcing not based on any particularized facts, but because there was reason to believe that drugs and firearms were present. (App. A-8, B-7, C-7). However this Court in *Richards* already acknowledged and rejected this very argument, stating that the State's interest in preventing a potential "'convergence in a violent and dangerous form of commerce of weapons and the destruction of drugs'" is insufficient to merit a

blanket exception to knock and announce. *Richards* at 392.

In *Richards*, this Court acknowledged that certain entries searching for drug evidence might rise to the level of exigency; however it emphasized the importance of maintaining a case-by-case analysis. The Court did so for two main reasons, both of which apply to the instant case.

First, this Court expressed concern about the tremendous overinclusiveness of the per se exception adopted by the Wisconsin Supreme Court. This Court recognized that a per se exception encompassed a significant proportion of cases where the government's interest in preserving evidence and officer safety did *not* outweigh the individual interest in privacy. *Id.* at 393. Here, just as in *Richards*, the ruling by the Eleventh Circuit improperly encompasses individuals who would never resist the police, yet own a licensed weapon for any of a number of valid reasons such as self-protection, recreation or hunting.

Second, this Court recognized that allowing a blanket exception based on a criminal category would impermissibly open the door to further categorical no-knock entry rules, allowing the gradual erosion of this important constitutional protection. As this Court stated,"the reasons for creating an exception in one category can, relatively easily, be applied to others." *Id.* at 393-394. This Court explained:

Armed bank robbers, for example,

> are by definition, likely to have weapons, and the fruits of their crime may be destroyed without too much difficulty. If a per se exception were allowed for each category of criminal investigation that included a considerable-albeit hypothetical-risk of danger to officers or destruction of evidence, the knock-and-announce element of the Fourth Amendment's reasonableness requirement would be meaningless. *Id.* at 394.

The Eleventh Circuit applies just this faulty reasoning, not to the category of armed burglars, but to the category of gun owners. This outcome is far more egregious, given the large proportion of legal gun owners in this country and the Second Amendment's protection of this right. As stated in *District of Columbia v. Heller*, the words of the Second Amendment "guarantee the individual right to possess and carry weapons in case of confrontation." 128 S. Ct. 2783, 2797 (2008). In fact, the effect of the Eleventh Circuit's decision is that any person who lawfully exercises his or her Second Amendment right thereby waives the Fourth Amendment's knock and announce protection.

Finally, this Court in *Richards* emphasized the importance of case-by-case analysis due to the heavy burden imposed by a no-knock entry. This Court stated that the intrusion of a no-knock entry could not be considered minimal, stating, "[t]hese interests

are not inconsequential . . . when police enter a residence without announcing their presence, the residents are not given any opportunity to prepare themselves for such an entry." *Richards* at 393. For Anthony Diotaiuto, the consequences were anything but minimal; at the tragically young age of 23 he lost his life.

The Eleventh Circuit's conclusion that the officers are protected by qualified immunity for their conduct cannot be reconciled with *Richard's* express rejection of a blanket exception to the knock and announce requirement. Thus, this Court should grant review on an issue which arises constantly throughout the country: if police believe that a person has a weapon in the home, even one (as in this case) lawfully present, is that sufficient by itself to justify an entry without knocking and announcing? If it is not sufficient, as *Richards v. Wisconsin* indicates, is there clearly established law that the reasonable officer should know?

This Court's reasoning in *Michigan v. Hudson*, 547 U.S. 586 (2006), also clearly establishes that this blanket exception is not permissible and that the Eleventh Circuit erred in finding qualified immunity. In that case, the police executed a search warrant for drugs and firearms on the home of petitioner Booker Hudson. *Id.* at 588. Officers approached the home, entered, and discovered large quantities of drugs, including rock cocaine in the petitioner's pockets. Furthermore, a "loaded gun was lodged between the cushion and armrest of the chair in which he was sitting." *Id.*

Unlike the instant case, in *Hudson*, police knocked and announced their presence, but did not wait before entering. All of the Justices conceded that the police violated the Fourth Amendment. In fact, the Court stated that, "[h]appily, . . Michigan has conceded that the entry was a knock-and-announce violation." *Id.* at 590. The issue was whether the exclusionary rule applied to the fruits of the search.

However, under the Eleventh Circuit's reasoning, the officers would not have violated the knock and announce requirement. In fact, a reasonable officer would not have needed to knock and announce at all, given that their search was for drugs and weapons.

Therefore, this Court's reasoning in *Richards v. Wisconsin* and *Michigan v. Hudson* clearly establishes that the finding of qualified immunity and the blanket exception created by the Eleventh Circuit are inconsistent with the Fourth Amendment.

B. The Eleventh Circuit's Ruling In This Case Is In Direct Conflict With Decisions Of Several Other Circuits And Review Should Be Granted To Resolve This Split On An Issue That Constantly Arises.

The Eleventh Circuit's decision, that the officers' belief that weapons and drugs were present in Anthony's home entitled them to qualified immunity and relieved them of the duty to knock and announce, stands in direct contrast to rulings by the Second,

Sixth, Seventh, Eighth, and Tenth Circuits, creating a significant split among the lower courts. Courts in these circuits consistently require a showing of specific and particularized evidence of officer peril to justify a no-knock entry where weapons are present, and explicitly reject the notion that presence of drugs and weapons is automatically sufficient for entering without knocking and announcing. Without strong evidence of officer peril, shown by a combination of a violent history and circumstances specific to the case showing the suspect's intent to resist, courts in these circuits continue to impose the knock and announce requirement on officers.

This case, where there were absolutely no particularized reasons to believe that officers faced peril, would have come out differently in any of these other circuits. Indeed, the clear and consistent law in these other Circuit, that the presence of drugs and weapons is not by itself sufficient to excuse the requirement for knocking and announcing, is inconsistent with the Eleventh Circuit's conclusion that there is not clearly established law and that qualified immunity is thus permissible.

The Sixth Circuit in *United States v. Nabors,* 901 F.2d 135, 1354-55 (6th Cir. 1990), explicitly held that mere presence of weapons did not rise to the level of exigency, stating, "[w]e do not hold ... that every time law enforcement personnel suspect that the subject of a search warrant possesses a firearm, a split-second announcement followed by a forced entry sufficiently complies with 18 U.S.C. § 3109."

Nabors involved a suspect on probation; officers obtained a warrant to search for weapons and other evidence. *Id.* at 1353. As in the instant case, officers knew that the suspect, Nabors, had a firearm. *Id.* Unlike in this case, this firearm was not legally owned. *Id.* In fact, ownership of it constituted a felony. *Id.* However, the officers still knocked and announced: "[t]he agents knocked on the apartment door and yelled, '"Police!,' and, 'Police search warrant!'" *Id.* In his escape Nabors shot an officer in the cheek. *Id.* His apartment contained a rifle, a pistol, cocaine, and drug paraphernalia. *Id.*

All the factors indicating officer peril present in the instant case were likewise present in *Nabors*, but to a far greater extent. The warrant indicated that "Nabors was suspected of trafficking in narcotics, was a felon in the possession of an array of firearms, and habitually wore a bullet-proof vest." *Id.* at 1354. However, in direct contrast to the Eleventh Circuit's current ruling, the Sixth Circuit still expressly said the officers must knock and announce before entering.

In contrast to the instant case, the Second Circuit in *United States v. Spinelli*, permitted a no-knock entry in similar circumstances but only where a wealth of specific detail suggested officer peril. 848 F. 2d 26 (2nd Cir. 1988). The Second Circuit pointed to a plethora of *additional* particularized evidence not present in the instant case, such as that Spinelli's street name was "Mad Man," that he had a reputation for violence, and that he was named on a United States Marshal's bulletin as wanted for parole

violation and considered armed and dangerous." *Id.* at 29. Finally, the officers knew that Spinelli was aware of their presence. *Id.* at 30. In the instant case, Anthony had no history of or reputation for violence, was specifically cited as non-violent by informants, and had no idea officers were present or planning to raid his home.

Like the Sixth Circuit and Second Circuit, the Eighth Circuit has also stated that the reasonable belief that firearms might be within the residence, standing alone, is clearly insufficient to justify entering a residence without the police knocking and announcing first. *United States v. Marts*, 986 F.2d 1216, 1217-18 (8th Cir.1993).

In a case in apparent conflict with the Eleventh Circuit's decision in this case, in *United States v. Lucht*, 18 F.3d 541 (8th Cir. 1994) cert. denied, 115 S.Ct. 363 (1994), the Eighth Circuit ruled a no-knock entry impermissible where police knew weapons were present in home, but where they had no indication that the suspect was violent or would use the weapons. This case involved an investigation of Hell's Angels members suspected of drug dealing. The court in *Lucht* emphasized that "[e]xigent circumstances will excuse noncompliance with the knock and announce requirement when the officers, "after considering the *particular* facts regarding the premises to be searched and the circumstances surrounding the execution of the warrant," reasonably decide there is an urgent need to force entry." *Id.* at 549.

In *Lucht*, the Eight Circuit found a knock and announce necessary even in circumstances where officers had "reason to believe weapons were present." *Id.* at 550. In addition, the suspect possessed drugs and had completed a drug transaction; weapons had been found in his home twice previously, he had a prior conviction for being a felon in possession of a firearm, and a prior arrest for assault with a firearm. The suspect also had a motion detector outside his home and officers were in an exposed position. *Id.*

Despite the showing of officer peril (far higher than that in the instant case,) the Eighth Circuit nonetheless found the officers' knock and announce necessary based on the lack of evidence that the suspect had a violent history or record. The officer was "not aware of any charges against Kress [the suspect] for assaulting a police officer or of any incidents in Omaha where any member of the Hell's Angels Motorcycle Club attacked an officer." *Id.* The Eighth Circuit in requiring a knock and announce, stated that "a decision to force entry cannot rest on an assumption. It requires consideration of the particular facts and circumstances surrounding the execution of the warrant." *Id.* The court further stated that the officers "did not hear or see anything to indicate they were in danger." *Id.* Despite the "likelihood that there were weapons in the house," the officers "had no information indicating that [the suspect] was considered dangerous or violent or might be inclined to use the weapons against them. *See United States v. Marts,* 986 F.2d 1216, 1217-18 (8th Cir.1993) (reasonable belief firearms may have been within residence, standing alone, clearly

insufficient for exigent circumstances)." *Id.* Furthermore, any "propensity for anti-police sentiments was not based on any particularized knowledge. In fact, Kress's criminal record consisted of a nine-year-old misdemeanor drug possession conviction and a thirteen-year-old charge for carrying a concealed weapon for which prosecution was declined." *Id.*

There is thus no doubt that this case would have come out differently if it had been litigated in the Eighth Circuit rather than the Eleventh Circuit.

The Seventh Circuit also reaches very different results from the Eleventh Circuit when confronted with facts similar to those of the instant case. In *Molina ex. rel. Molina v. Cooper*, 325 F.3d 963 (7th Cir. 2003), the target of the warrant had a criminal history, alleged drug distribution activities, association with gangs, and stash of weapons at his home qualifying the search as "high-risk." *Id.* at 966. Still, the Seventh Circuit required knocking and announcing before the police entered the residence. *Id.*

As in this case, two informants had related to police that the suspect had a history of dealing drugs and kept weapons in the home. Unlike in this case, the suspect in *Molina* had more indicators of potential dangerousness, including active gang affiliations and a wide assortment of illegal weapons including brass knuckles, a switchblade, fireworks, and three homemade bombs with functional fuses, in contrast to Diotaiuto's legally owned firearms. *Id.* at

967. However the Seventh Circuit held that the officers acted correctly in performing a knock and announce, specifically detailing in the opinion that "Trooper Bain, a TRT member, initiated the search by knocking on the front door and calling out three times, "Illinois State Police search warrant, open the door!" *Id.* The Seventh Circuit also required a knock and announce in *United States v. Jones*, 208 F.3d 603, 610 (7th Cir. 2000), where the officers "had information that the defendant was a dangerous felon in possession of a gun."

In *Jones v. Wilhelm*, 425 F.3d 455 (7th Cir. 2005), the Seventh Circuit again came to a holding different from that of the Eleventh Circuit. Officers executed a search warrant on the home of a suspected drug dealer. *Id.* at 455. As in the instant case, the executing officer argued that the knock and announce violation should be "excused on the basis of exigent circumstances inherent in executing a search warrant at night on a suspected drug operation." *Id.* at 468. The Seventh Circuit specifically rejected this argument because "nothing in the warrant suggested or predicted a particular risk of violence or destruction of evidence." *Id.* This is in direct conflict with the Eleventh Circuit's ruling in this case.

In *Hernandez v. Conde*, 272 Fed. Appx. 663 (10th Cir. 2008) the Tenth Circuit likewise held a knock and announce necessary given facts similar to the instant case. Police officers attempted a drug bust, knowing that the execution would likely be dangerous. *Id.* at 666. As in the instant case, a team member threw a flash-bang device before the officers

entered the dwelling. *Id.* However in this case, the Tenth Circuit held a knock and announce to be necessary before the officers entered the dwelling. *Id.*

The issue constantly arises as to whether police may enter a dwelling without knocking and announcing based on a belief that weapons are present, or whether there must be a more particularized based for believing that there would be danger to the officers. There is a clear split among the circuits on this issue and thus a need for this Court to grant review to settle this disagreement.

C. Resolution Of This Issue Is Of Crucial Importance To Civil Rights Plaintiffs, Police Officers, and Third Parties

The knock and announce requirement protects both individuals and law enforcement in several important ways. Knocking and announcing prevents unnecessary property damage and allows home dwellers a few moments to gather themselves and put on clothing before officers enter.

Furthermore, the requirement prevents unnecessary violence and resistance by confused inhabitants during the crucial and dangerous moment when officers breach a person's home. A knock and announce by the police ensures the inhabitants will not mistake police for home intruders and resist. This rule likewise protects innocent inhabitants of a home who might get caught in the crossfire.

The tension between the Eleventh Circuit's decision and the rulings of this Court and other circuits leaves officers uninformed as to the proper and lawful response to heightened circumstances which fall short of true exigency. This guidance is crucial to their safe and successful operations in law enforcement, and to shield them from undeserved legal consequences.

The Eleventh Circuit's opinion exonerating the officers who shot and killed Anthony Diotaiuto, disregards the crucial nature of the knock and announce requirement. Its ruling is overbroad, encompassing far too many people who may legally own a weapon, but do not pose a danger to police. In fact, this was just the case with Anthony Diotaiuto, who, far from being a dangerous criminal, was a young student and a new homeowner with no history of violence whatsoever. Furthermore, this ruling dangerously opens the door to more per se exceptions to the knock and announce requirement.

As stated by Justice Kennedy in his concurrence to *Michigan v. Hudson*, "[i]t bears repeating that this is a serious matter if law enforcement officers violate the sanctity of the home by ignoring the requisites of lawful entry. Security must not be subject to erosion by indifference or contempt." *Hudson* at 602.

This Court should grant review to resolve a tension with its prior rulings and a conflict among the circuits as to whether the law is clearly established that the lawful presence of drugs and weapons are not sufficient to allow police to depart from the

constitutional requirement of knocking and announcing before entering a dwelling.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: March 8, 2010.

Respectfully submitted,

WILLIAM R. SCHERER III
JANINE K. MCGUIRE
CONRAD & SCHERER LLP
633 South Federal Highway
Eighth Floor
Fort Lauderdale, FL 33301
(954) 462-5500

ERWIN CHEMERINSKY
Counsel of Record
UNIVERSITY OF
CALIFORNIA IRVINE
401East Peltason Drive
Irvine, CA 92697-8000
(949) 824-722

TERRY COLLINGSWORTH
CONRAD & SCHERER LLP
1156 15th Street, N.W.
Suite 502
Washington DC 20005
(202) 543-4001

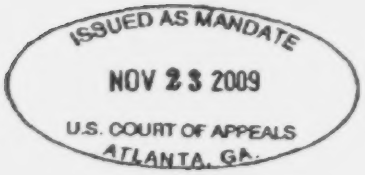
PAUL L. HOFFMAN
VICTORIA DON
SCHONBRUN DESIMONE
SEPLOW HARRIS
& HOFFMAN LLP
723 Ocean Front Walk
Venice, CA 90291
(310) 396-0731

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 08-12900

D.C. Docket No. 07-60476 CV-WPD



FILED
U.S. Court of Appeals
Eleventh Circuit
Aug. 31, 2009
Thomas K. Kahn, Clerk

MARLENE WHITTIER,
as Personal Representative of the Estate
of Anthony Diotaiuto deceased and individually,
ANDREW DIOTAIUTO,
Plaintiffs-Appellees,

versus

ANDRE BRUNA, individually,
SEAN VISNERS, individually,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered:	August 31, 2009
For the Court:	Thomas K. Kahn, Clerk
By:	Gilman, Nancy

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-12900

D.C. Docket No. 07-60476 CV-WPD

FILED
U.S. Court of Appeals
Eleventh Circuit
Aug. 31, 2009
Thomas K. Kahn, Clerk

MARLENE WHITTIER,
as Personal Representative of the Estate
of Anthony Diotaiuto deceased and individually,
ANDREW DIOTAIUTO,
Plaintiffs-Appellees,

versus

ANDRE BRUNA, individually,
SEAN VISNERS, individually,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(August 31, 2009)

Before EDMONDSON, BLACK and SILER,* Circuit Judges.

PER CURIAM:

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* Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Sixth Circuit, sitting by designation.

Andre Bruna and Sean Visners, two officers with the City of Sunrise, Florida, Police Department, appeal the district court's order denying in part their motion for summary judgment. Bruna and Visners were members of a Special Weapons and Tactics (SWAT) team that conducted a raid on Plaintiff-Appellee Marlene Whittier's home, which she shared with her son, Anthony Diotaiuto. During the raid, Diotaiuto was shot and killed. Whittier brought a 42 U.S.C. § 1983 action, both individually and as personal representative of Diotaiuto's estate, against several members of the SWAT team alleging, *inter alia*, Bruna and Visners violated her son's Fourth Amendment rights when they entered her home without first knocking and announcing their presence. After extensive discovery, Bruna and Visners moved for summary judgment, arguing they were entitled to qualified immunity and no genuine issue of material fact existed as to whether a knock and announce occurred. The district court denied their motion as to Whittier's knock-and-announce claim. Because Bruna and Visners are entitled to qualified immunity, we now reverse.

I. FACTS

In July 2005, one of Anthony Diotaiuto's neighbors informed the City of Sunrise Police Department (Sunrise police) that Diotaiuto was selling large quantities of cannabis and cocaine from his residence. Based upon this information, law enforcement began an investigation of Diatiuto's drug activity, which included surveillance of the Whittier/Diotaiuto residence and a "controlled buy" of marijuana by a confidential informant. In addition to evidence that Diotiuto was selling illegal narcotics in his home, the investigation also revealed Diataiuto carried a handgun on his person at all times and kept a loaded shotgun in his bedroom closet.

On August 3, 2005, a state circuit judge signed a warrant for the Sunrise police to search the Whittier/Diotaiuto home. Based upon Diotaiuto's drug activity and possession of firearms, the Sunrise police classified the warrant as "high risk," which the Sunrise police define as "involving acts of violence or potential acts of violence." The Sunrise police use a SWAT team in the service of all "high risk" warrants, and thus a SWAT team was assembled to serve the warrant on the Whittier/Diotaiuto residence.

In preparation for the service of the warrant, the Sunrise police made a SWAT operational plan. This plan indicated Diotaiuto sold illegal narcotics from his home, had a criminal history, and possessed two firearms–a semi-automatic handgun carried on his person and a shotgun kept in his bedroom closet. The plan also called for an eight-man SWAT team to execute the warrant; a team leader was responsible for knocking and announcing the presence of the SWAT team prior to entry, while appellants Bruna and Visners were positioned "in the stack." The members of the SWAT team received and reviewed the information in the operational plan during a briefing that was held in the early morning hours of August 5, 2005.[1]

Following the briefing, at just after 6:00 a.m. on that same day, the SWAT team arrived at the Whittier/Diotaiuto residence to execute the warrant. According to the testimony of the officers, the SWAT team leader approached the door, knocked loudly several times, and announced the presence of the Sunrise police and the search warrant. Fourteen police officers present at the scene testified they heard a knock and

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[1] Visners did not attend this briefing; he instead was privately briefed by the SWAT team leader at approximately 5:40 the same morning.

announce. Only a single officer did not hear a knock and announce. Despite the fact that nearly every officer present heard a loud and forceful knock and announce, not a single neighbor heard a knock or an announcement of the police presence. At least three neighbors testified they were listening and would have been able to hear such an announcement if it had occurred.

Next, the SWAT team leader signaled for the breach team to open the front door. After the door was pried open, the SWAT team entered the home and encountered Diotaiuto, who was instructed to "get on the ground." Diotaiuto did not comply with the order and instead ran to his bedroom. Bruna and Visners followed in pursuant, kicked open the bedroom door, and followed Diotaiuto inside. According to the testimony of the officers, Diotaiuto entered his closet, racked a gun, and pointed it at the officers. Both Bruna and Visners were yelling at Diotaiuto to put the gun down. They then opened fire and Diotaiuto fell back into the closet. From a seated position in the closet, Diotaiuto began to raise his gun again. Both officers yelled at Diotaiuto to drop the gun; their commands, however, were disregarded. Bruna and Visners fired again, and Diotaiuto was killed.

II. STANDARD OF REVIEW

This Court reviews "*de novo* a district court's disposition of a summary judgment motion based on qualified immunity, applying the same legal standards as the district court." *Durruthy v. Pastor,* 351 F.3d 1080, 1084 (11th Cir. 2003). We resolve all issues of material fact in favor of the plaintiff, and then, under that version of the facts, determine the legal question of whether the defendant is entitled to qualified immunity. *Id.*

III. DISCUSSION

"Qualified immunity protects government officials performing discretionary functions from suits in their individual capacities unless their conduct violates 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Dalrymple v. Reno*, 334 F.3d 991, 994 (11th Cir. 2003) (quoting *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 2515 (2002)). "[T]o receive qualified immunity, an official must first establish that 'he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred.'" *McCullough v. Antolini*, 559 F.3d 1201, 1205 (11th Cir. 2009) (quoting *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002)).

"If the official was acting within the scope of his discretionary authority . . . the burden shifts to the plaintiff to show that the official is not entitled to qualified immunity." *Skop v. City of Atlanta*, 485 F.3d 1130, 1136-37 (11th Cir. 2007). "To overcome qualified immunity, the plaintiff must satisfy a two prong test; he must show that: (1) the defendant violated a constitutional right, and (2) this right was clearly established at the time of the alleged violation." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1264 (11th Cir. 2004). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202, 121 S. Ct. 2152, 2156 (2001).

Whittier asserts Bruna and Visners entered her and her son's residence without first knocking and announcing their presence in violation of the Fourth Amendment. The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable

searches and seizures." U.S. Const. Amend. IV. In *Wilson v. Arkansas*, 514 U.S. 927, 929, 115 S. Ct. 1914, 1915 (1995), the Supreme Court held the Fourth Amendment reasonableness inquiry incorporated the common law requirement that officers, when executing a search warrant, must knock on a door and announce their identity before attempting a forcible entry into a home. The Court, however, recognized "[t]he Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests," *id.* at 934, 115 S. Ct. at 1918, and noted the knock-and-announce requirement could give way "under circumstances presenting a threat of physical violence," or "where police officers have reason to believe that evidence would likely be destroyed if advance notice were given," *id.* At 936, 115 S. Ct. at 1919.

Following *Wilson*, some courts created a blanket exception to the knock-and-announce requirement in felony drug cases, based in part on the generalization that these cases often involve a threat of violence and destruction of drugs. *See Richards v. Wisconsin*, 520 U.S. 385, 392, 117 S. Ct. 1416, 1420 (1997). In *Richards v. Wisconsin*, however, the Supreme Court rejected such a categorical exception and instead adopted a case-by-case approach for determining if law enforcement acted reasonably in entering a residence without first knocking and announcing: "In order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Id.* at 394, 117 S. Ct. at 1421. The Court acknowledged, however, "[t]his showing is not high." *Id.*, 117 S. Ct. at 1422.

Both *Wilson* and *Richards* were criminal cases in which the defendants had moved to suppress evidence based upon alleged Fourth Amendment violations. In the context of qualified immunity, this Court has stated "the issue is not whether reasonable suspicion existed in fact, but whether the officer had 'arguable' reasonable suspicion." *Jackson v. Sauls*, 206 F.3d 1156, 1166 (11th Cir. 2000). In other words, we analyze whether a reasonable officer could have had reasonable suspicion that exigent circumstances, such as a threat of violence and/or destruction of evidence, existed to justify the no-knock entry. *See Brent v. Ashley*, 247 F.3d 1294, 1303 (11th Cir. 2001) (discussing the arguable reasonable suspicion standard within the context of strip searches). In undertaking the arguable reasonable suspicion inquiry, this Court must examine the totality of the circumstances to determine whether an officer had a "particularized and objective" basis to support his suspicion. *Id.* at 1304. Whether the officer's suspicion ends up being mistaken is immaterial so long as it was reasonable. *Id.* at 1303.

Within the context of warrantless searches, we have held the mere presence of contraband, without more, does not give rise to exigent circumstances. *United States v. Tobin*, 923 F.2d 1506, 1510 (11th Cir. 1991). At the same time, however, we have also repeatedly noted the dangerous, and often violent, combination of drugs and firearms, *see, e.g., United States v. Hromada*, 49 F.3d 685, 689 (11th Cir. 1995) ("Guns and violence go hand-in-hand with illegal drug operations."), and several of our sister circuits have concluded this combination may give rise to reasonable suspicion of danger and justify a no-knock entry, *see United States v. Stevens*, 439 F.3d 983, 988-89 (8th Cir. 2006) (affirming a magistrate judge's conclusion that a no-knock search was justified based upon the presence of drugs and a sawed-off

shotgun in a common area of the house); *United States v. Washington*, 340 F.3d 222, 227 (5th Cir. 2003) (stating information that "the suspect was selling drugs and was typically armed . . . . exceeds the level this circuit has found sufficient to establish a reasonable suspicion of danger").

In this case, we conclude Bruna and Visners are entitled to qualified immunity because a reasonable officer could have had reasonable suspicion that knocking and announcing his presence would have been dangerous under the circumstances facing the SWAT team.[2]

Those circumstances included serving a search warrant on the home of a suspected drug dealer (Diotaiuto), who had ready access to firearms and occupied the premises when the SWAT team arrived to serve the warrant. Indeed, based upon the information available to the SWAT team, Diotaiuto (1) received and sold narcotics, including cocaine and marijuana, at his residence; (2) had a criminal history; (3) carried a concealed semi-automatic handgun on his person; and (4) possessed a shotgun that he kept in his bedroom. This information, which was contained in the SWAT team's operational plan and received and reviewed by the members of the team, provided a "particularized and objective" basis for a reasonable officer to suspect the situation had a potential for violence and to believe exigent circumstances existed to

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[2] We are aware that the officers maintain a knock and announcement took place and that fourteen officers have testified to that effect. Whether a knock and announce actually occurred, however, is irrelevant to our analysis of arguable reasonable suspicion, and thus the outcome in this case is the same under both the officers' and Whittier's versions of the facts.

justify a no-knock entry.[3]

The fact that the operational plan called for a knock and announce prior to entry does not alter our analysis. Even assuming the operational plan, which was prepared prior to the service of the warrant, speaks for what Bruna and Visners actually believed as they stood "in the stack" outside the Whittier/Diotaiuto residence, the officers' *subjective* beliefs regarding the circumstances are irrelevant to the qualified immunity inquiry. *See Harlow v. Fitzgerald*, 457 U.S. 800, 817-18, 102 S. Ct. 2727, 2737-38 (1982) (discarding the subjective component of the qualified immunity inquiry and adopting the "objective reasonableness" standard); *Jackson*, 206 F.3d at 1165 ("[T]he standard for determining if an officer violated clearly established law is an objective one and does not include inquiry into the officer's subjective intent or beliefs."). Moreover, we have held an officer is entitled to qualified immunity even when he reasonably, but mistakenly, believes reasonable suspicion is present, *see Brent*, 247 F.3d

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[3] Our inquiry is whether Bruna and Visners had arguable reasonable suspicion that exigent circumstances existed to justify a no-knock entry, and thus we specifically decline to address whether exigent circumstances did indeed exist under the facts of this case. In a footnote of its order denying the SWAT team leader's motion for summary judgment as to the knock-and-announce claim, the district court concluded no exigent circumstances existed. On appeal, we do not disturb this determination because the pertinent inquiry is not whether exigent circumstances *actually* existed, but whether a reasonable officer, acting under the same circumstances and possessing the same knowledge as Bruna and Visners, *could have believed* they did. *See* Jackson, 206 F.3d at 1165-66.

at 1303; it makes little sense to not afford the same protection to an officer who, sensitive to the rights citizens enjoy under the Constitution, initially, but mistakenly, believes the situation involves a constitutional protection, but later learns it does not.

IV. CONCLUSION

In sum, we conclude Bruna and Visners are entitled to qualified immunity on Whittier's knock-and-announce claim. Accordingly, we reverse the district court's order denying their motion for summary judgment as to this claim.[4]

REVERSED.

A True Copy - Attested
Clerk U.S. Court of Appeals,
Eleventh Circuit

By: /s/ _____
Deputy Clerk
Atlanta, Georgia

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[4] Because we conclude Bruna and Visners are entitled to summary judgment on the basis of qualified immunity, we need not address the second issue they raise on appeal–that is, whether they are entitled to summary judgment on the ground that no genuine issue of material fact existed as to whether a knock and announce actually occurred. We note, however, we likely would not have jurisdiction to consider this issue on an interlocutory appeal, as it is not a part of, or inextricably intertwined with, the core qualified immunity issue. *See Behrens v. Pelletier*, 516 U.S. 299, 312-13, 116 S. Ct. 834, 842 (1996); *Koch v. Rugg*, 221 F.3d 1283, 1295-96 (11th Cir. 2000).

APPENDIX B

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-12836

D.C. Docket No. 07-60476 CV-WPD

FILED
U.S. Court of Appeals
Eleventh Circuit
Aug. 31, 2009
Thomas K. Kahn, Clerk

MARLENE WHITTIER,
as Personal Representative of the Estate
of Anthony Diotaiuto deceased and individually,
ANDREW DIOTAIUTO,
Plaintiffs-Appellees,

versus

ERIC GOLDSTEIN, individually,
ERIK PALACIO, individually,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(August 31, 2009)

Before EDMONDSON, BLACK and SILER,* Circuit Judges.

PER CURIAM:

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* Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Sixth Circuit, sitting by designation.

Eric Goldstein and Erik Palacio, two officers with the City of Sunrise, Florida, Police Department, appeal the district court's order denying in part their motion for summary judgment. Goldstein and Palacio were members of a Special Weapons and Tactics (SWAT) team that conducted a raid on Plaintiff-Appellee Marlene Whittier's home, which she shared with her son, Anthony Diotaiuto. During the raid, Diotaiuto was shot and killed. Whittier brought a 42 U.S.C. § 1983 action, both individually and as personal representative of Diotaiuto's estate, against several members of the SWAT team alleging, *inter alia*, Goldstein and Palacio violated her son's Fourth Amendment rights when they forcibly opened and entered her home without first knocking and announcing their presence. After extensive discovery, Goldstein and Palacio moved for summary judgment, arguing they were entitled to qualified immunity and no genuine issue of material fact existed as to whether a knock and announce occurred. The district court denied their motion. Because Goldstein and Palacio are entitled to qualified immunity, we now reverse.

I. FACTS

In July 2005, one of Anthony Diotaiuto's neighbors informed the City of Sunrise Police Department (Sunrise police) that Diotaiuto was selling large quantities of cannabis and cocaine from his residence. Based upon this information, law enforcement began an investigation of Diatiuto's drug activity, which included surveillance of the Whittier/Diotaiuto residence and a "controlled buy" of marijuana by a confidential informant. In addition to evidence that Diotiuto was selling illegal narcotic in his home, the investigation also revealed Diataiuto carried a handgun on his person at all times and kept a loaded shotgun in his bedroom closet.

On August 3, 2005, a state circuit judge signed a warrant for the Sunrise police to search the Whittier/Diotaiuto home. Based upon Diotiuto's drug activity and possession of firearms, the Sunrise police classified the warrant as "high risk," which the Sunrise police define as "involving acts of violence or potential acts of violence." The Sunrise police use a SWAT team in th service of all "high risk" warrants, and thus a SWAT team was assembled to serve the warrant on the Whittier/Diotaiuto residence.

In preparation for the service of the warrant, the Sunrise police made a SWAT operational plan. This plan indicated Diotaiuto sold illegal narcotics from his home, had a criminal history, and possessed two firearms--a semi-automatic handgun carried on his person and a shotgun kept in his bedroom closet. The plan also called for an eight-man SWAT team to execute the warrant; a team leader was responsible for knocking and announcing the presence of the SWAT team prior to entry, while appellants Goldstein and Palacio were positioned "in the stack" and assigned to the breach team. The members of the SWAT team received and reviewed the information in the operational plan during a briefing that was held in the early morning hours of August 5, 2005.

Following the briefing, at just after 6:00 a.m. on that same day, the SWAT team arrived at the Whittier/Diotaiuto residence to execute the warrant. According to the testimony of the officers, the SWAT team leader approached the door, knocked loudly several times, and announced the presence of the Sunrise police and the search warrant. Fourteen police officers present at the scene testified they heard a knock and announce. Only a single officer did not hear a knock and announce. Despite the fact that nearly every officer present heard a loud and forceful knock and announce, not a single neighbor heard a knock or an announcement of the police

presence. At least three neighbors testified they were listening and would have been able to hear such an announcement if it had occurred.

Next, the SWAT team leader signaled for Goldstein and Palacio to breach the front door. Goldstein and Palacio followed the order and pried the door open, enabling the SWAT team to enter the home. After encountering Diotaiuto, the SWAT team leader instructed Diotaiuto to "get on the ground." Diotaiuto did not comply with the order and instead ran to his bedroom. Two SWAT team officers followed in pursuant, kicked open the bedroom door, and followed Diotaiuto inside. According to the testimony of the officers, Diotaiuto entered his closet, racked a gun, and pointed it at the officers. Both officers were yelling at Diotaiuto to put the gun down. They then opened fire, and Diotaiuto fell back into the closet. From a seated position in the closet, Diotaiuto began to raise his gun again. Both officers yelled at Diotaiuto to drop the gun; their commands, however, were disregarded. The officers fired again, and Diotaiuto was killed.

II. STANDARD OF REVIEW

This Court reviews "*de novo* a district court's disposition of a summary judgment motion based on qualified immunity, applying the same legal standards as the district court." *Durruthy v. Pastor,* 351 F.3d 1080, 1084 (11th Cir. 2003). We resolve all issues of material fact in favor of the plaintiff, and then, under that version of the facts, determine the legal question of whether the defendant is entitled to qualified immunity. *Id.*

III. DISCUSSION

"Qualified immunity protects government officials performing discretionary functions from suits in their individual capacities unless their conduct violates 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Dalrymple v. Reno*, 334 F.3d 991, 994 (11th Cir. 2003) (quoting *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 2515 (2002)). "[T]o receive qualified immunity, an official must first establish that 'he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred.'" *McCullough v. Antolini*, 559 F.3d 1201, 1205 (11th Cir. 2009) (quoting *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002)).

"If the official was acting within the scope of his discretionary authority . . . the burden shifts to the plaintiff to show that the official is not entitled to qualified immunity." *Skop v. City of Atlanta*, 485 F.3d 1130, 1136-37 (11th Cir. 2007). "To overcome qualified immunity, the plaintiff must satisfy a two prong test; he must show that: (1) the defendant violated a constitutional right, and (2) this right was clearly established at the time of the alleged violation." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1264 (11th Cir. 2004). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202, 121 S. Ct. 2152, 2156 (2001).

Whittier asserts Goldstein and Palacio entered her and her son's residence without first knocking and announcing their presence in violation of the Fourth Amendment. The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable

searches and seizures." U.S. Const. Amend. IV. In *Wilson v. Arkansas*, 514 U.S. 927, 929, 115 S. Ct. 1914, 1915 (1995), the Supreme Court held the Fourth Amendment reasonableness inquiry incorporated the common law requirement that officers, when executing a search warrant, must knock on a door and announce their identity before attempting a forcible entry into a home. The Court, however, recognized "[t]he Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests," *id.* at 934, 115 S. Ct. at 1918, and noted the knock-and-announce requirement could give way "under circumstances presenting a threat of physical violence," or "where police officers have reason to believe that evidence would likely be destroyed if advance notice were given," *id.* At 936, 115 S. Ct. At 1919.

Following *Wilson*, some courts created a blanket exception to the knock-and-announce requirement in felony drug cases, based in part on the generalization that these cases often involve a threat of violence and destruction of drugs. *See Richards v. Wisconsin*, 520 U.S. 385, 392, 117 S. Ct. 1416, 1420 (1997). In *Richards v. Wisconsin*, however, the Supreme Court rejected such a categorical exception and instead adopted a case-by-case approach for determining if law enforcement acted reasonably in entering a residence without first knocking and announcing: "In order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Id.* at 394, 117 S. Ct. at 1421. The Court acknowledged, however, "[t]his showing is not high." *Id.*, 117 S. Ct. at 1422.

Both *Wilson* and *Richards* were criminal cases in which the defendants had moved to suppress evidence based upon alleged Fourth Amendment violations. In the context of qualified immunity, this Court has stated "the issue is not whether reasonable suspicion existed in fact, but whether the officer had 'arguable' reasonable suspicion." *Jackson v. Sauls*, 206 F.3d 1156, 1166 (11th Cir. 2000). In other words, we analyze whether a reasonable officer could have had reasonable suspicion that exigent circumstances, such as a threat of violence and/or destruction of evidence, existed to justify the no-knock entry. *See Brent v. Ashley*, 247 F.3d 1294, 1303 (11th Cir. 2001) (discussing the arguable reasonable suspicion standard within the context of strip searches). In undertaking the arguable reasonable suspicion inquiry, this Court must examine the totality of the circumstances to determine whether an officer had a "particularized and objective" basis to support his suspicion. *Id.* at 1304. Whether the officer's suspicion ends up being mistaken is immaterial so long as it was reasonable. *Id.* at 1303.

Within the context of warrantless searches, we have held the mere presence of contraband, without more, does not give rise to exigent circumstances. *United States v. Tobin*, 923 F.2d 1506, 1510 (11th Cir. 1991). At the same time, however, we have also repeatedly noted the dangerous, and often violent, combination of drugs and firearms, *see, e.g., United States v. Hromada,* 49 F.3d 685, 689 (11th Cir. 1995) ("Guns and violence go hand-in-hand with illegal drug operations."), and several of our sister circuits have concluded this combination may give rise to reasonable suspicion of danger and justify a no-knock entry, *see United States v. Stevens,* 439 F.3d 983, 988-89 (8th Cir. 2006) (affirming a magistrate judge's conclusion that a no-knock search was justified based upon the presence of drugs and a sawed-off

shotgun in a common area of the house); *United States v. Washington*, 340 F.3d 222, 227 (5th Cir. 2003) (stating information that "the suspect was selling drugs and was typically armed . . . . exceeds the level this circuit has found sufficient to establish a reasonable suspicion of danger").

In this case, we conclude Goldstein and Palacio are entitled to qualified immunity because a reasonable officer could have had reasonable suspicion that knocking and announcing his presence would have been dangerous under the circumstances facing the SWAT team.[1] Those circumstances included serving a search warrant on the home of a suspected drug dealer (Diotaiuto), who had ready access to firearms and occupied the premises when the SWAT team arrived to serve the warrant. Indeed, based upon the information available to the SWAT team, Diotaiuto (1) received and sold narcotics, including cocaine and marijuana, at his residence; (2) had a criminal history; (3) carried a concealed semi-automatic handgun on his person; and (4) possessed a shotgun that he kept in his bedroom. This information, which was contained in the SWAT team's operational plan and received and reviewed by the members of the team, provided a "particularized and objective" basis for a reasonable officer to suspect the situation had a potential for violence and to believe exigent circumstances existed to

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[1] We are aware that the officers maintain a knock and announcement took place and that fourteen officers have testified to that effect. Whether a knock and announce actually occurred, however, is irrelevant to our analysis of arguable reasonable suspicion, and thus the outcome in this case is the same under both the officers' and Whittier's versions of the facts.

justify a no-knock entry.[2]

The fact that the operational plan called for a knock and announce prior to entry does not alter our analysis. Even assuming the operational plan, which was prepared prior to the service of the warrant, speaks for what Goldstein and Palacio actually believed as they stood "in the stack" outside the Whittier/Diotaiuto residence, the officers' *subjective* beliefs regarding the circumstances are irrelevant to the qualified immunity inquiry. *See Harlow v. Fitzgerald*, 457 U.S. 800, 817-18, 102 S. Ct. 2727, 2737-38 (1982) (discarding the subjective component of the qualified immunity inquiry and adopting the "objective reasonableness" standard); *Jackson*, 206 F.3d at 1165 ("[T]he standard for determining if an officer violated clearly established law is an objective one and does not include inquiry into the officer's subjective intent or beliefs."). Moreover, we have held an officer is entitled to qualified immunity even when he reasonably, but mistakenly, believes reasonable suspicion is

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[2] Our inquiry is whether Goldstein and Palacio had arguable reasonable suspicion that exigent circumstances existed to justify a no-knock entry, and thus we specifically decline to address whether exigent circumstances did indeed exist under the facts of this case. In a footnote of its order denying the SWAT team leader's motion for summary judgment as to the knock-and-announce claim, the district court concluded no exigent circumstances existed. On appeal, we do not disturb this determination because the pertinent inquiry is not whether exigent circumstances *actually* existed, but whether a reasonable officer, acting under the same circumstances and possessing the same knowledge as Goldstein and Palacio, *could have believed* they did. *See Jackson*, 206 F.3d at 1165-66.

present, *see Brent*, 247 F.3d at 1303; it makes little sense to not afford the same protection to an officer who, sensitive to the rights citizens enjoy under the Constitution, initially, but mistakenly, believes the situation involves a constitutional protection, but later learns it does not.

IV. CONCLUSION

In sum, we conclude Goldstein and Palacio are entitled to qualified immunity on Whittier's knock-and-announce claim. Accordingly, we reverse the district court's order denying their motion for summary judgment.[3]

REVERSED.

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[3] Because we conclude Goldstein and Palacio are entitled to summary judgment on the basis of qualified immunity, we need not address the second issue they raise on appeal–that is, whether they are entitled to summary judgment on the ground that no genuine issue of material fact existed as to whether a knock and announce actually occurred. We note, however, we likely would not have jurisdiction to consider this issue on an interlocutory appeal, as it is not a part of, or inextricably intertwined with, the core qualified immunity issue. *See Behrens v. Pelletier*, 516 U.S. 299, 312-12, 116 S. Ct. 834, 842 (1996); *Kock v. Rugg*, 221 F.3d 1283, 1295-96 (11th Cir. 2000).

APPENDIX C

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-12998

D.C. Docket No. 07-60476 CV-WPD

FILED
U.S. Court of Appeals
Eleventh Circuit
Aug. 31, 2009
Thomas K. Kahn, Clerk

MARLENE WHITTIER,
as Personal Representative of the Estate
of Anthony Diotaiuto deceased and
individually, ANDREW DIOTAIUTO,
Plaintiffs-Appellees,

versus

DANIEL KOBAYASHI, individually,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(August 31, 2009)

Before EDMONDSON, BLACK and SILER,* Circuit Judges.

PER CURIAM:

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* Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Sixth Circuit, sitting by designation.

Daniel Kobayashi, an officer with the City of Sunrise, Florida, Police Department, appeals the district court's order denying in part his motion for summary judgment. Kobayashi was a member of a Special Weapons and Tactics (SWAT) team that conducted a raid on Plaintiff-Appellee Marlene Whittier's home, which she shared with her son, Anthony Diotaiuto. During the raid, Diotaiuto was shot and killed. Whittier brought a 42 U.S.C. § 1983 action, both individually and as personal representative of Diotaiuto's estate, against several members of the SWAT team alleging, *inter alia*, Kobayashi violated her son's Fourth Amendment rights when he entered her home without first knocking and announcing the SWAT team's presence. After extensive discovery, Kobayashi moved for summary judgment, arguing he was entitled to qualified immunity and no genuine issue of material fact existed as to whether a knock and announce occurred. The district court denied his motion as to Whittier's knock-and-announce claim. Because Kobayashi is entitled to qualified immunity, we now reverse.

I. FACTS

In July 2005, one of Anthony Diotaiuto's neighbors informed the City of Sunrise Police Department (Sunrise police) that Diotaiuto was selling large quantities of cannabis and cocaine from his residence. Based upon this information, law enforcement began an investigation of Diatiuto's drug activity, which included surveillance of the Whittier/Diotaiuto residence and a "controlled buy" of marijuana by a confidential informant. In addition to evidence that Diotiuto was selling illegal narcotics in his home, the investigation also revealed Diataiuto carried a handgun on his person at all times and kept a loaded shotgun in his bedroom closet.

On August 3, 2005, a state circuit judge signed a warrant for the Sunrise police to search the Whittier/Diotaiuto home. Based upon Diotiuto's drug activity and possession of firearms, the Sunrise police classified the warrant as "high risk," which the Sunrise police define as "involving acts of violence or potential acts of violence." The Sunrise police use a SWAT team in th service of all "high risk" warrants, and thus a SWAT team was assembled to serve the warrant on the Whittier/Diotaiuto residence.

In preparation for the service of the warrant, the Sunrise police made a SWAT operational plan. This plan indicated Diotaiuto sold illegal narcotics from his home, had a criminal history, and possessed two firearms – a semi-automatic handgun carried on his person and a shotgun kept in his bedroom closet. The plan also called for an eight-man SWAT team to execute the warrant; Kobayashi was designated as the team leader and was responsible for knocking and announcing the presence of the SWAT team prior to entry. The members of the SWAT team received and reviewed the information in the operational plan during a briefing that was held in the early morning hours of August 5, 2005.

Following the briefing, at just after 6:00 a.m. on that same day, the SWAT team arrived at the Whittier/Diotaiuto residence to execute the warrant. According to the testimony of the officers, Kobayashi approached the door, knocked loudly several times, and announced the presence of the Sunrise police and the search warrant. Fourteen police officers present at the scene testified they heard a knock and announce. Only a single officer did not hear a knock and announce. Despite the fact that nearly every officer present heard a loud and forceful knock and announce, not a single neighbor heard a knock or an announcement of the police presence. At least three neighbors testified they were

listening and would have been able to hear such an announcement if it had occurred.

Next, Kobayashi signaled for the breach team to open the front door. After the door was pried open, the SWAT team entered the home and encountered Diotaiuto, whom Kobayashi instructed to "get on the ground." Diotaiuto did not comply with the order and instead ran to his bedroom. Two SWAT team officers followed in pursuant, kicked open the bedroom door, and followed Diotaiuto inside. According to the testimony of the officers, Diotaiuto entered his closet, racked a gun, and pointed it at the officers. Both officers were yelling at Diotaiuto to put the gun down. They then opened fire, and Diotaiuto fell back into the closet. From a seated position in the closet, Diotaiuto began to raise his gun again. Both officers yelled at Diotaiuto to drop the gun; their commands, however, were disregarded. The officers fired again, and Diotaiuto was killed.

II. STANDARD OF REVIEW

This Court reviews " *de novo* a district court's disposition of a summary judgment motion based on qualified immunity, applying the same legal standards as the district court." *Durruthy v. Pastor,* 351 F.3d 1080, 1084 (11th Cir. 2003). We resolve all issues of material fact in favor of the plaintiff, and then, under that version of the facts, determine the legal question of whether the defendant is entitled to qualified immunity. *Id.*

III. DISCUSSION

"Qualified immunity protects government officials performing discretionary functions from suits in their individual capacities unless their conduct violates 'clearly

established statutory or constitutional rights of which a reasonable person would have known.'" *Dalrymple v. Reno*, 334 F.3d 991, 994 (11th Cir. 2003) (quoting *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 2515 (2002)). "[T]o receive qualified immunity, an official must first establish that 'he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred.'" *McCullough v. Antolini*, 559 F.3d 1201, 1205 (11th Cir. 2009) (quoting *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002)).

"If the official was acting within the scope of his discretionary authority . . . the burden shifts to the plaintiff to show that the official is not entitled to qualified immunity." *Skop v. City of Atlanta*, 485 F.3d 1130, 1136-37 (11th Cir. 2007). "To overcome qualified immunity, the plaintiff must satisfy a two prong test; he must show that: (1) the defendant violated a constitutional right, and (2) this right was clearly established at the time of the alleged violation." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1264 (11th Cir. 2004). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it ould be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202, 121 S. Ct. 2152, 2156 (2001).

Whittier asserts Kobayashi entered her and her son's residence without first knocking and announcing their presence in violation of the Fourth Amendment. The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. In *Wilson v. Arkansas*, 514 U.S. 927, 929, 115 S. Ct. 1914, 1915 (1995), the Supreme Court held the Fourth Amendment reasonableness inquiry incorporated the common law requirement that officers, when executing a search warrant,

must knock on a door and announce their identity before attempting a forcible entry into a home. The Court, however, recognized "[t]he Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests," *id.* at 934, 115 S. Ct. at 1918, and noted the knock-and-announce requirement could give way "under circumstances presenting a threat of physical violence," or "where police officers have reason to believe that evidence would likely be destroyed if advance notice were given," *id.* At 936, 115 S. Ct. at 1919.

Following *Wilson*, some courts created a blanket exception to the knock-and-announce requirement in felony drug cases, based in part on the generalization that these cases often involve a threat of violence and destruction of drugs. See *Richards v. Wisconsin*, 520 U.S. 385, 392, 117 S. Ct. 1416, 1420 (1997). In *Richards v. Wisconsin*, however, the Supreme Court rejected such a categorical exception and instead adopted a case-by-case approach for determining if law enforcement acted reasonably in entering a residence without first knocking and announcing: "In order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Id.* at 394, 117 S. Ct. at 1421. The Court acknowledged, however, "[t]his showing is not high." *Id.*, 117 S. Ct. at 1422.

Both *Wilson* and *Richards* were criminal cases in which the defendants had moved to suppress evidence based upon alleged Fourth Amendment violations. In the context of qualified immunity, this Court has stated "the issue is not whether reasonable suspicion existed in fact, but whether the

officer had 'arguable' reasonable suspicion." *Jackson v. Sauls*, 206 F.3d 1156, 1166 (11th Cir. 2000). In other words, we analyze whether a reasonable officer could have had reasonable suspicion that exigent circumstances, such as a threat of violence and/or destruction of evidence, existed to justify the no-knock entry. *See Brent v. Ashley*, 247 F.3d 1294, 1303 (11th Cir. 2001) (discussing the arguable reasonable suspicion standard within the context of strip searches). In undertaking the arguable reasonable suspicion inquiry, this Court must examine the totality of the circumstances to determine whether an officer had a "particularized and objective" basis to support his suspicion. *Id.* at 1304. Whether the officer's suspicion ends up being mistaken is immaterial so long as it was reasonable. *Id.* at 1303.

Within the context of warrantless searches, we have held the mere presence of contraband, without more, does not give rise to exigent circumstances. *United States v. Tobin*, 923 F.2d 1506, 1510 (11th Cir. 1991). At the same time, however, we have also repeatedly noted the dangerous, and often violent, combination of drugs and firearms, *see, e.g., United States v. Hromada,* 49 F.3d 685, 689 (11th Cir. 1995) ("Guns and violence go hand-in-hand with illegal drug operations."), and several of our sister circuits have concluded this combination may give rise to reasonable suspicion of danger and justify a no-knock entry, *see United States v. Stevens,* 439 F.3d 983, 988-89 (8th Cir. 2006) (affirming a magistrate judge's conclusion that a no-knock search was justified based upon the presence of drugs and a sawed-off shotgun in a common area of the house); *United States v. Washington,* 340 F.3d 222, 227 (5th Cir. 2003) (stating information that "the suspect was selling drugs and was typically armed . . . . exceeds the level this circuit has found sufficient to establish a reasonable suspicion of danger").

In this case, we conclude Kobayshi is entitled to qualified immunity because a reasonable officer could have had reasonable suspicion that knocking and announcing his presence would have been dangerous under the circumstances facing the SWAT team.[1] Those circumstances included serving a search warrant on the home of a suspected drug dealer (Diotaiuto), who had ready access to firearms and occupied the premises when the SWAT team arrived to serve the warrant. Indeed, based upon the information available to the SWAT team, Diotaiuto (1) received and sold narcotics, including cocaine and marijuana, at his residence; (2) had a criminal history; (3) carried a concealed semi-automatic handgun on his person; and (4) possessed a shotgun that he kept in his bedroom. This information, which was contained in the SWAT team's operational plan and received and reviewed by the members of the team, provided a "particularized and objective" basis for a reasonable officer to suspect the situation had a potential for violence and to believe exigent circumstances existed to justify a no-knock entry.[2]

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[1] We are aware that Kobayashi maintains he did actually knock and announce the SWAT team's presence and that fourteen officers have testified to that effect. Whether a knock and announce actually occurred, however, is irrelevant to our analysis of arguable reasonable suspicion, and thus the outcome in this case is the same under both the officers' and Whittier's versions of the facts.

[2] Our inquiry is whether Kobayashi had arguable reasonable suspicion that exigent circumstances existed to justify a no-knock entry, and thus we specifically decline to address whether exigent circumstances did indeed exist under the facts of this case. In a footnote of

The fact that the operational plan called for a knock and announce prior to entry does not alter our analysis. Even assuming the operational plan, which was prepared prior to the service of the warrant, speaks for what Kobayashi actually believed as he stood outside the Whittier/Diotaiuto residence, Kobayashi's *subjective* beliefs regarding the circumstances are irrelevant to the qualified immunity inquiry. *See Harlow v. Fitzgerald*, 457 U.S. 800, 817-18, 102 S. Ct. 2727, 2737-38 (1982) (discarding the subjective component of the qualified immunity inquiry and adopting the "objective reasonableness" standard); *Jackson*, 206 F.3d at 1165 ("[T]he standard for determining if an officer violated clearly established law is an objective one and does not include inquiry into the officer's subjective intent or beliefs."). Moreover, we have held an officer is entitled to qualified immunity even when he reasonably, but mistakenly, believes reasonable suspicion is present, *see Brent*, 247 F.3d at 1303; it makes little sense to not afford the same protection to an officer who, sensitive to the rights citizens enjoy under the Constitution, initially, but mistakenly, believes the situation involves a constitutional protection, but later learns it does not.

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its order denying the SWAT team leader's motion for summary judgment as to the knock-and-announce claim, the district court concluded no exigent circumstances existed. On appeal, we do not disturb this determination because the pertinent inquiry is not whether exigent circumstances *actually* existed, but whether a reasonable officer, acting under the same circumstances and possessing the same knowledge as Kobayashi, *could have believed* they did. *See Jackson*, 206 F.3d at 1165-66.

IV. CONCLUSION

In sum, we conclude Kobayashi is entitled to qualified immunity on Whittier's knock-and-announce claim. Accordingly, we reverse the district court's order denying his motion for summary judgment as to this claim.[3]

REVERSED.

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[3] Because we conclude Kobayashi is entitled to summary judgment on the basis of qualified immunity, we need not address the second issue he raises on appeal–that is, whether he is entitled to summary judgment on the ground that no genuine issue of material fact existed as to whether a knock and announce actually occurred. We note, however, we likely would not have jurisdiction to consider this issue on an interlocutory appeal, as it is not a part of, or inextricably intertwined with, the core qualified immunity issue. *See Behrens v. Pelletier*, 516 U.S. 299, 312-12, 116 S. Ct. 834, 842 (1996); *Kock v. Rugg*, 221 F.3d 1283, 1295-96 (11th Cir. 2000).

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-60476-CIV-DIMITROULEAS
Magistrate Judge Rosenbaum

MARLENE WHITTIER, as Personal Representative for the Estate of ANTHONY DIOTAIUTO, deceased and individually,

Plaintiff,

vs.

CITY OF SUNRISE, a Municipality of the State of Florida, ANDRE BRUNA, individually, SEAN VISNERS, individually, DAVID BOYETT, individually, DANIEL KOBAYASHI, individually, ERIC GOLDSTEIN, individually, and ERIK PALACIO, individually,

Defendants.

ORDER GRANTING, IN PART, AND DENYING, IN PART, DEFENDANTS ANDRE BRUNA AND SEAN VISNERS' MOTION FOR SUMMARY JUDGMENT

THIS CAUSE is before the Court upon Defendants Andre Bruna and Sean Visners' Motion for Summary Judgment [DE 143]. The Court has carefully considered the Motion, Plaintiff's Memorandum in Opposition [DE *155],* Defendants' Reply [DE 176], Defendants Daniel Kobayashi and the City of Sunrise's statement of Material Facts [DE 135], Plaintiffs Omnibus Statement of Material and Controverted Facts [DE 153] the parties attached exhibits and depositions and is otherwise fully advised in the premises.

I. BACKGROUND

On April 11, 2007 the Plaintiff, Marlene Whittier ("Plaintiff"), as Personal representative of her son Anthony Diotaiuto ("Diotaiuto"), and individually, filed a seven count Amended Complaint against Defendant Officers Eric Goldstein ("Goldstein"), Erik Palacio ("Palacio"), the City of Sunrise ("City"), Officer Sean Visners ("Visners"), Chief David Boyett,[1] Officer Andre Bruna ("Bruna") and Sergeant Daniel Kobayashi ("Kobayashi") [DE 9]. Plaintiffs son was shot to death by a police SWAT unit executing a search warrant in the early morning hours of August 5, 2005.

Early in the morning on August 5, 2005, the SWAT team was briefed, and received an operational plan, before executing a search warrant. The target of the search warrant was the Whittier/Diotaiuto home, located at 8500 N.W. 24th Court, Sunrise, Florida. The operational plan utilized an eight (8) man SWAT team to execute the warrant, called for the team leader to knock and announce prior to entry and called for the deployment of a flash-bang distraction device[2] before entry. Kobayashi was the SWAT supervisor and team leader. The SWAT team was dressed in full SWAT gear with the word "police" prominently displayed on their uniforms. All

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[1] On August 20, 2007 the Court granted Defendant David Boyett's Motion to Dismiss [DE *54*].

[2] A flash-bang distractionary device is a "light/sound diversionary device designed to emit a brilliant light and loud noise upon detonation. Its purpose is to stun, disorient, and temporarily blind its targets, creating a window of time in which police officers can safely enter and secure a potentially dangerous area." Boyd v. Benton County, 374 F.3d 773, 776 (9th Cir. 2004).

members of the SWAT team had attended extensive training and had been instructed that flash-bang devices should not be thrown directly at individuals. Palacio and Goldstein made up the breach team and were responsible for forcibly opening the residence door if necessary. Officer Bruna was responsible for deploying the flash-bang device.

According to police intelligence, Diotaiuto was a known drug dealer. Investigations into Diotaiuto's drug activity lead to the eventual issuance of a search warrant. Intelligence also revealed that Diotaiuto had a concealed weapons permit and carried a handgun on him at all times. Additional intelligence advised that he kept a shot-gun in the master bedroom closet of his home. Based on this information, the warrant service was labeled "high risk" which the City defines as "involving acts of violence or potential acts of violence." The City utilizes a SWAT team in the service of all "high risk" warrants.

Just after 6:00 in the morning on August 5, 2005 the SWAT team approached the door of the Whittier/Diotaiuto household. According to the testimony of the officers, Kobayashi approached the door, knocked loudly several times and announced the presence of the Sunrise Police and the search warrant.[3] Fourteen (14) police officers present at the scene testified that they heard Kobayashi knock and

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[3] Although all officers now testify that Sergeant Kobayashi was the one who knocked and announced, on August 5, 2005 Kobayashi gave a sworn statement indicating that it was Defendants Goldstein and Palacio who executed the knock and announce.

announce.[4] Only a single officer, Officer Bettencourt, did not hear the knock and announce. Despite the fact that nearly every officer present heard a loud and forceful, knock and announce, not a single neighbor heard a knock or an announcement of the police presence.[5] At least three neighbors, Noreen Dows,[6]

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[4] Defendant Officer Erik Palacio, Defendant Officer Eric Goldstein, Defendant Officer Sean Visners, Defendant Officer Andre Burna, Defendant Sergeant Daniel Kobayashi, Officer Kevin McDonnell, Lieutenant Charles Vitale, Officer John Jaslowski, Detective Luis Castro, Detective Michael Calise, Detective Barry Schwartz, Officer Machelle Quinones, Officer Antoine Bennet and Officer Brooke Lebel all testified that they heard Kobayashi knock and announce.

[5] Defendant argues that the Plaintiffs witnesses fail the "personal knowledge" requirement of Rule 602 of the Federal Rules of Evidence. The Court agrees with the Plaintiff that their witnesses easily meet the personal knowledge requirement in testifying to events not perceived through one of the five senses. See Los Angeles Times Commc'ns, LLC v. Dept. of the Army, 442 F. Supp. 2d 880, 886 (C.D. Cal. 2006). As more fully discussed below, the Plaintiff points to other cases where courts have permitted testimony by lay witnesses as to what they *did not* perceive. See e.g. Massasoit v. Carter, 439 F. Supp. 2d 463, 477 (M.D.N.C. 2006); Vathekan v. Prince George's County, 154 F.3d 173, 175-76 (4th Cir. 1998); Kopf v. Wing, 942 F.2d 265, 266 (4th Cir. 1991).

[6] Noreen Dows lives behind and diagonal to the Whittier/Diotaiuto household. Their back yards are kittycorner to one another. Mrs. Dows woke up at approximately 5:15 a.m. and was having coffee on her

Rudy Strauss[7] and Nicholas Spatafora[8] testified that they

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back porch when she heard a loud sound like an electrical transformer blowing and saw a bright light. She then investigated and was told that the presence in the backyard was the Sunrise Police. Mrs. Dows then returned to her house where she heard a serious of popping noises. She did not hear anyone knock and announce and she testified in her deposition that she would have been able to hear an officer who loudly announced himself at the Whittier/Diotaiuto front porch. She testified that she has previously heard conversations coming from the driveway and has even heard keys drop on the driveway.

[7] Rudy Strauss lives next door to the Whittier/Diotaiuto household. Mr. Strauss and his wife were standing at their window watching the officers line up at the Whittier/Diotaiuto household. Mr. Strauss testified in his deposition that it is his opinion that he would have been able to hear a knock and announce, if one had occurred, he did not hear one. He only heard a loud bang and saw a flash like a flash bulb on a camera. Mr. Strauss' opinion did not change after he found out that he also did not hear the battering ram break down the Whittier/Diotaiuto front door.

[8] Nicholas Spatafora lives across the street from the Whittier/Diotaiuto household. On August 5, 2005, Mr. Spatafora was standing in his living room ironing his shirt when he heard three or four loud noise that sounded like someone was hitting his parked car with a bat. After about 15-20 seconds, Mr. Spatafora heard a series of sounds like a bunch of firecrackers going on inside the house. Mr. Spatafora testified that he heard no knock or announcement from the police and that had there been a

were listening and would have been able to hear such an announcement if it had occurred. In response, the Defendants seek to introduce testimony by their sound expert, based on sound tests taken during a re-creation of the alleged "knock and announce," suggesting that even if these neighbors had been paying attention, they could not physically have heard the knock and announce.[9] The Plaintiff vigorously disputes the accuracy of this evidence.

Next, the breach team was signaled by Seargent Kobayashi. Officer Goldstein operated the Halligan tool, which is pushed into the door frame and struck with a battering ram until the door opens. Officer Palacio operated the battering ram. Palacio and Goldstein testified that it took about 10-15 second to open the door. After he pried the door open, Officer Goldstein testified that he saw Diotaiuto sitting on the couch.

After the Defendants breached the door, Officer Bruna

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knock and announce he would have heard it. He testified that he has heard even regular conversations coming from the Whittier/Diotaiuto driveway. The results of the expert's sound test did cause Mr. Spatafora to change his testimony.

[9] Sound tests were conducted at Noreen Dows' household and at Nicholas Spatafora's household, but not at Rudy and Jane Strauss' household. These sound tests were not taken at the same time of day, or under the same atmospheric circumstances, as the series of events at issue in this case.

looked into the house,[10] did not see the Defendant, and deployed a flash bang distractive device in the direction of the back bedroom. When the SWAT team entered the house, Diotaiuto was standing in his boxer shorts staring at the police officers. Kobayashi yelled "get on the ground." Instead of complying with the police orders, Diotaiuto began running to the back bedroom of the house, where he kept his weapons. Defendants Bruna and Visners chased Diotaiuto to the back bedroom, and Officer Visners kicked open the door, yelled "police" and followed the suspect inside. Bruna and Visners testified that Diotaiuto entered his closet, racked his gun, came out of the closet holding the gun and pointed it at Visners. Defendants then open fired, aiming at center mass, and were admittedly shooting with the intent to inflict fatal injuries to Diotaiuto. After the initial round of shots, Diotaiuto fell back into the closet. From a seated position, in the closet, both officers testify, and their testimony is uncontradicted, that Diotaiuto began to raise his gun again. Both officers yelled at Diotaiuto to drop the gun, however their commands were disregarded. The officers fired again and Diotaiuto was killed. Officer Visners then stepped on Diotaiuto's hand and Bruna removed the gun and moved it away from Diotaiuto.

The medical examiner and Plaintiff's own forensic pathology expert testified that on autopsy, the decedent

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[10] Despite the fact that the Plaintiff contests this fact, as discussed more fully below, she has advanced no evidence suggesting that the flash bang was thrown either blindly into the house, or intentionally at Diotaiuto. Officer Bruna testified that he looked before he threw the flash-bang and Detective Kevin McDonnell also testified that he saw Bruna look inside the residence prior to deploying the distractive device.

showed no signs of injury from the distraction device. Instead, the decedent died from the fatal gunshot wounds fired by Officers Bruna and Visners. Plaintiff's forensic expert further testified that there was no forensic evidence that contradicted Officers Bruna and Visners testimony. Although the evidence was also consistent with other possible scenarios, it was completely consistent with the officers' testimony. The instant lawsuit, brought by his mother, followed.

II. DISCUSSION

In Count I of the Amended Complaint the Plaintiff alleges that Defendants Bruna and Visners violated Diotaiuto's civil rights by entering his home without knocking and announcing the presence of police officers, that Bruna violated Diotaiuto's civil rights when he deployed a flash-bang distractive device either blindly or directly at Diotaiuto and that Bruna and Visners violated Diotaiuto's civil rights when they used deadly force without probable cause to believe Diotaiuto posed a threat of harm. In their Motion, Bruna and Visners argue that they are entitled to summary judgment because (1) the admissible evidence in this case establishes that Defendant Kobayashi knocked and announced before entering the Plaintiff's residence; and (2) the record is devoid of any evidence that Officer Bruna deployed the flash-bang device blindly or directly at Diotaiuto. The Defendants further argue that they are entitled to qualified immunity because (3) even if Kobayashi failed to knock and announce, Bruna and Visners are nonetheless entitled to qualified immunity because they were not responsible for knocking or announcing their presence; (4) even if the flash-bang were deployed blindly or directly at Diotaiuto this is insufficient, as a matter of law, to establish a Fourth Amendment violation and any such right was not clearly established at the time; and finally (5) Defendants Bruna and Visners are entitled to

qualified immunity because the undisputed evidence establishes that there was at least arguable probable cause that for the officers to believe that Diotaiuto posed a threat to the officers or to others. The Court will address each argument in turn.

A. Summary Judgment Standard

The Court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The stringent burden of establishing the absence of a genuine issue of material fact lies with the moving party. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The Court should not grant summary judgment unless it is clear that a trial is unnecessary, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), and any doubts in this regard should be resolved against the moving party, Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970).

The movant "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp., 477 U.S. at 323. To discharge this burden, the movant must point out to the Court that there is an absence of evidence to support the nonmoving party's case. Id. at 325.

After the movant has met its burden under Rule 56(c), the burden of production shifts and the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). According to the

plain language of Federal Rule of Civil Procedure 56(e), the non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings," but instead must come forward with "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); Matsushita, 475 U.S. at 587.

Essentially, so long as the non-moving party has had an ample opportunity to conduct discovery, it must come forward with affirmative evidence to support its claim. Anderson, 477 U.S. at 257. "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be a sufficient showing that the jury could reasonably find for that party." Walker v. Darby, 911 F.2d 1573, 1577 (11th Cir. 1990). If the evidence advanced by the non-moving party "is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. 242, 249-50 (internal citations omitted). Consideration of a motion for summary judgment, however, "does not lessen the burdens on the non-moving party: the non-moving party still bears the burden of coming forward with sufficient evidence on *each element* that must be proven." Earley v. Champion Int'l Corp., 907 F.2d 1077, 1080 (11th Cir. 1990) (emphasis in original).

B. A Material Dispute of Fact Exists as to whether Defendant Kobayashi Knocked and Announced before entering.

The common-law principle that law enforcement officers must announce their presence and provide residents an opportunity to open the door is an ancient one. See Wilson v. Arkansas, 514 U.S. 927, 93 1-32 (1995). The Defendants argue that the evidence in this case conclusively proves, as a matter of law, that Kobayashi knocked and announced before

entering the Whittier/Diotaiuto residence to serve the search warrant. Defendants point out that fourteen (14) different officers present on the scene testified that a knock and announce occurred. The Defendants contend that this evidence is uncontroverted. Defendants further argue that the neighbors who testified that they did not hear a knock and announce are insufficient to create a genuine issue of material fact. Defendants base this argument upon the statements of various witnesses that they were either sleeping, inside, or not paying attention at the time of the alleged knock and announce. Defendants also advance expert witness evidence suggesting that none of the neighbors would have been able to hear the knock and announce from where they were positioned even if they were paying close attention.

In response, the Plaintiff contends that a genuine issue of material fact remains with respect to whether the knock and announce occurred because not a single neighbor or witness heard it. Plaintiff points to at least three (3) witnesses who adamantly believe that they were paying attention, in close proximity to the Whittier/Diotaiuto household at a quiet hour of the morning, and if such a knock and announce occurred, they would have heard it. The Court agrees that the Plaintiff has advanced sufficient evidence to create a triable issue of material fact.

Courts have held that the fact that witnesses who were in a position to hear something and did not in fact hear it, would allow a jury reasonably to conclude that the something did not occur. See Vathekan v. Prince George's County, 154 F.3d 173, 180 (4th Cir. 1998) ("If a warning is not given, then a witness will not hear one. A juror could reasonably conclude that if certain witnesses did not hear a warning, then *no* warning was given, even if other witnesses testify to a warning."); Kopf v. Wing, 942 F.2d 265, 267-68 (4th Cir.

1991) (finding that the District Court improperly made determinations of material fact when it discounted civilian witness testimony that they heard no warning given before a police officer released his police dog.); Massasoit v. Carter, 439 F. Supp. 2d 463, 478 (M.D.N.C. 2006) ("In the end, viewing all of the evidence in the light most favorable to plaintiffs, Phelps was in a place where he could have heard Tomeny yelling for him to kill or shoot Butler and he did not hear this. In instances such as this, the Court cannot simply ignore the fact that a witness did not hear something that they should have heard.").

This case is much like the case in Sledd v. Linsday, 102 F.3d 282 (7th Cir. 1996), where the Seventh Circuit found that several triable issues of material fact remained with respect to whether the Plaintiff had suffered a Fourth Amendment violation. In Sledd, the court credited the testimony of the "neighbors in the adjacent duplexes" who "also heard no 'knock and announce' prior to the officers' forced entry into the house." Id. at 286. The court eventually found that:

> [h]ere, there are jury issues on several crucial questions. First, the parties dispute whether the officers announced their presence and warned Sledd that they were police executing a warrant. The police officers have not claimed any exigent circumstances to exempt their actions from the usual 'knock and announce' rule. Sledd introduced testimony from a number of persons that no warnings were given and that the officers were not otherwise identifiable as members of the police department.

Id. at 288. Likewise, in this case the Plaintiff has introduced testimony that none of the neighbors home on the morning of

the incident heard the police knock and announce, and that at least three (3) of these neighbors believe that they were in a position to have heard any such knock or announcement had either occurred. The Defendants may be able to discredit this testimony using their expert's testimony, or otherwise. However, this factual determination is one for the jury and not for the Court. Accordingly, the Court finds that material fact issues remain as to whether Kobayashi knocked and announced the police's presence, as constitutionally required, before entering the Whittier/Diotaiuto household, and therefore his motion for summary judgment must be denied on these grounds.

C. Defendant Bruna is Entitled to Qualified Immunity with Respect to the Charges Regarding the Improper Deployment of the Flash-Bang Device.

Defendants next argue that the evidence conclusively shows that Defendant Bruna looked before he threw the flash-bang and did not throw it directly at Diotaiuto. The Court agrees, the record does not support any conclusion that Bruna deployed the flash-bang in the matter accused by the Plaintiff. Both Officer Bruna and Detective McDonnell testified that Bruna looked into the house before he deployed the device. As evidence that Bruna is lying, Plaintiff points to Officer Goldstein's testimony that he saw Diotaiuto in the living room shortly before Bruna threw the device and Officer Visners' testimony that he saw Diotaiuto shortly after Bruna threw the device. However, the fact that these officers saw the Diotaiuto and Bruna did not does not mean that Bruna did not look at the portion of the room where he was instructed to throw the flash-bang. The evidence advanced by the Plaintiff is entirely insufficient to raise a genuine issue of material fact. The record shows that Diotaiuto showed no signs of injury,

whatsoever, from the distraction device, suggesting that the device did not detonate within any dangerous proximity to Diotaiuto. Plaintiff also points to the fact that there is no specific passage in the written materials indicating that officers should not throw a flash-bang blindly or directly at a subject. Both Defendants Bruna and Kobayashi testified that the training Bruna underwent taught him that under normal circumstances this was an improper manner in which to deploy the device. Accordingly, the uncontradicted evidence in this case conclusively shows that the Defendant did not deploy the flash-bang device in the manner accused by the Plaintiff Accordingly, summary judgment on this claim is appropriate.

D. Qualified Immunity Standard

Qualified immunity is an entitlement not to stand trial or face the burden of litigation, rather than a mere defense to liability. Gonzales v. Reno, 325 F.3d 1228, 1233 (11th Cir. 2003). Whether a public officer is entitled to qualified immunity depends on the specific details of a case, and is a question of law for the Court. Tapley v. Collins, 211 F.3d 1210, 1215 (11th Cir. 2000). "The purpose of this immunity is to allow governmental officials to carry out their discretionary duties without the fear of personal liability or harassing litigation, protecting from suit all but the plainly incompetent or one who is knowingly violating the federal law." Lee v. Ferraro, 284 F.3d 1188, 1194 (11th Cir. 2002) (internal citations omitted). Under the doctrine, "'government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Evans v. Hightower, 117 F.3d 1318, 1320 (11th Cir. 1997) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818

(1982)).

In addressing claims of qualified immunity, the Eleventh Circuit applies the following two-part analysis. "First the defendant government official must prove that he was acting within the scope of his discretionary authority when the alleged wrongful act occurred. If the defendant meets this burden, the plaintiff must then demonstrate that the defendant violated clearly established law based upon objective standards." Evans, 117 F.3d at 1320 (internal citations omitted).

Under the first step of the analysis, as the Court found in its Orders Denying the Defendants' Motions to Dismiss, the officers were undoubtedly engaged in a discretionary function while executing a search warrant. No party disputes this.

Considering the second part of the qualified immunity analysis, a plaintiff must then demonstrate that the defendants violated "clearly established law based on objective standards." Evans, 117 F.3d at 1320 (citing Hartsfield v. Lemacks, 50 F.3d 950, 953 (11th Cir. 1995)). "In order to meet this burden, the plaintiff must demonstrate that the contours of his right were sufficiently clear so that reasonable officers would have understood that their actions violated his rights." Evans, 117 F.3d at 1320 (citing Swint v. City of Wadley, 51 F.3d 988, 995 (11th Cir. 1995) and Anderson v. Creighton, 483 U.S. 635, 640 (1987)). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . , but it is to say that in the light of pre-existing law the unlawfulness must be apparent." Anderson, 483 U.S. at 640 (internal citations omitted); see also Moniz v. City of Fort Lauderdale, 145 F.3d 1278, 1282 (11th Cir. 1998).

The analysis of whether a "clearly established law" was violated also has two steps. Holmes v. Kucynda, 321 F.3d 1069, 1077 (11th Cir. 2003). First, is the "threshold question" of whether the facts as alleged, viewed in the light most favorable to the Plaintiff, would establish a constitutional violation. Id. (citing Saucier v. Katz, 533 U.S. 194, 201 (2001)). "If no constitutional violation is established, then the defendants prevail, and 'there is no necessity for further inquiries concerning qualified immunity." Id. (quoting Saucier, 533 U.S. at 201). However, if a constitutional right would have been violated under the plaintiffs version of the facts, the Court then must determine whether that right was clearly established. Id. The Court will apply this analysis to each of the Defendants specific claims of qualified immunity.

E. Defendants are not Entitled to Qualified Immunity at this Time on the Knock and Announce Claim

With respect to the knock and announce claims, Defendants argue alternatively, that even if a constitutional violation occurred, and no knock and announce took place, they are nonetheless entitled to qualified immunity because they reasonably relied on orders from Defendant Kobayashi in entering the dwelling without first knocking and announcing their presence.

In its Orders Denying Defendants' Goldstein and Palacio's Motions, the Court held that the "state of the law in 2003, much less 2005, certainly gave the officers fair warning that an entry, without knocking and announcing, would be unconstitutional, absent some exceptions." at p. 5 (citing Green v. Butler, 420 F.3d 689, 701 (7th Cir. 2005)), and as more fully explained above, the Court finds that material fact issues remain as to whether a knock and announce occurred in this case. Accordingly, the Defendants do not argue that

this right was not clearly established, nor do they argue that exigent circumstances were present or that knocking or announcing would have proven futile. Rather, they argue that they are entitled to qualified immunity because Defendants Bruna and Visners were not the team leaders nor was knocking and announcing their presence part of their responsibilities in executing the search warrant. Defendants argue that it was reasonable for them to rely on the decision made by their team leader to enter the residence, despite any absence of a knock and announcement.

Several cases, not cited by the Defendants, stand for the proposition that under certain circumstances an officer may be entitled to qualified immunity when following the direct orders of a superior. See Vela v. White, 703 F.2d 147, 152 (5th Cir. 1983) ("Under the circumstances of this case, it would not be fair to force [the defendant] to either violate a direct order or else stop and interrogate [his supervisor] as to the reasons for his order, at the risk of being held liable for damages."); Brent v. Ashley, 247 F.3d 1294, 1306 (11th Cir. 2001) ("Here, the record is devoid of any evidence that would support the conclusion that [the defendants] acted unreasonably [in following their superior's orders]."); Higgins v. Gee, 2008 WL 190493 (M.D. Fla. January 22, 2008) ("the Court notes that there is authority . . . for the proposition that an officer who follows the direct orders of a supervisor in effecting an arrest may be entitled to qualified immunity, *under certain circumstances.")*. However, in each of these cases the courts engaged in a fact intensive inquiry as to whether it was reasonable, under the circumstances, for the officer to rely on such commands of his or her superior. In these cases, it was reasonable for the officers to rely on such commands because the individual officers were not present for all of the events leading up to the alleged constitutional violations and therefore had no reason to doubt the

commands. As the Eleventh Circuit pointed out in Jordan v. Doe, 38 F.3d 1559, 1571 (11th Cir. 1994), it did not "mean to suggest that a defendant is entitled to immunity merely upon proof that he or she was acting pursuant to orders. This is not and should not be the law." Instead, the Court finds that cases cited by the Defendants establish that the inquiry turns on whether or not it was *reasonable,* under the circumstances, for the officer to rely on the commands of his or her superior.

Issues of fact remain as to whether the it was reasonable for Officers Bruna and Visners to rely on Kobayashi's orders to enter the dwelling without a proper knock and announce. The Court agrees, however, with the Fifth Circuit in Hodge v. Laryisson, 226 F.3d 642; 2000 WL 1029029 *2 (5th Cir. 2000) (unpublished opinion), that not every law enforcement officer is required to knock and announce. The Court also agrees that an officer should not be expected to question his or her supervisor's orders in a police paramilitary operation when split second decisions are made in the field, and any delay could endanger the lives of the other officers present. See Graham v. Connor, 490 U.S. 386, 396-97 (1989) ("The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving. . ."). It would be reasonable for an officer to rely on their supervisor's split second decision that circumstances have changed and a knock-and-announce is no longer required. Here, however, no one argues that this was the case. What is more, in this ease there is a material issue of fact as to whether the police are lying concerning whether a knock and announce actually occurred, especially considering Kobayashi's prior sworn statement that Officers Palacio and Goldstein actually executed the knock and announce. Accordingly, if the jury determines that the police officers are lying and that no knock and announce in fact occurred, they

may be able to circumstantially infer that they lied about any prior knowledge of the intent of the SWAT operation to dispense with the knock and announcement altogether. If the Defendants were involved in, or privy to, any prior determination that no knock and announce was to occur in this case, despite being constitutionally required, then any reliance on orders given by Kobayashi was misplaced and any grant of qualified immunity is inappropriate.

In this case, Defendants Bruna and Visners were present for all of the events leading up to the forced entry and nobody claims that there were any exigent circumstances or that a knock and announce was not required. Defendants Bruna and Visners were also informed of the operational plan ahead of time and were briefed prior to the execution of the warrant.[11] This operational plan called for a knock and announce. No reason has been given for the change in plans, should the jury find that no knock and announce occurred. Accordingly, while it would have been reasonable under the circumstances for Defendants Bruna and Visners to rely on Kobayashi's command to enter without first knocking and announcing if such a determination were a splitsecond decision made during the execution of the warrant. Such reliance, however, would not be reasonable if the Defendants had prior knowledge of the intention to dispense with the knock and announce requirement. Because the jury could infer from circumstantial evidence that the officers have fabricated their story, qualified

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[11] Accordingly, this case is distinguishable from Hodge, 226 F.3d 642, because in that case there was no evidence that the "tag-along" officer was privy to any of the operational plans. Accordingly, it would have been more reasonable for this officer to rely on the representation of his supervising officer that a knock and announce could be dispensed with.

immunity is not appropriate at this time absent further factual findings by the jury.[12] The law was clearly established at the time that entering a dwelling without first knocking and announcing, absent exigent circumstances, violates the Fourth Amendment of the Constitution. If the Defendants knowingly did not abide by this constitutional requirement they can be held liable.

The Court is cognizant that qualified immunity is an entitlement not to stand trial or face the burden of litigation, rather than a mere defense to liability, Gonzales, 325 F.3d at 1233, and therefore should be granted at the earliest possible point in the case, Id.; Parrish v. Nikolits, 86 F.3d 1088, 1094 (11th Cir. 1996). While the Court takes this responsibility seriously, because the Court finds that issues of fact remain with respect to the circumstances surrounding any failure to knock and announce, the Defendants are not entitled to qualified immunity on this issue at this time and their motion must be denied pending further factual determinations by the jury.

F. Even if Bruna Deployed the Flash-Bang Device Blindly or Directly at Diotaiuto, He is Nonetheless Entitled to Qualified Immunity.

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[12] At trial, the Defendants may argue alternatively that they are entitled to qualified immunity because their reliance was reasonable and request a special interrogatory verdict form at the charge conference. The Court may use these factual findings to grant qualified immunity at this point, as a mailer of law, if the jury's factual findings show that such immunity is warranted. See Priester v. City of Riviera Beach, 208 F.3d 919, 926 (11th Cir. 2000).

Despite the fact that the Court has already held that the record does not support any conclusion that officer Bruna threw the flash-bang device either blindly or directly at Diotaiuto, the Court will, in an abundance of caution, address Defendant Bruna's qualified immunity claim. Defendant Bruna argues alternatively that *even if* the facts claimed by the Plaintiff were true, he would nonetheless be entitled to qualified immunity. The Court agrees.

As the Defendants point out, courts have repeatedly upheld the use of distraction devices for high risk warrants so long as not deployed in a dangerous manner, around innocent bystanders, the elderly or small children. See e.g. United States v. Boulanger, 444 F.3d 76, 85 (1st Cir. 2006) (noting that "the police planned the search after determining that there were no children or elderly people in the apartment."); Molina v. Cooper, 325 F.3d 963, 973 (7th Cir. 2003) (considering the fact that the "flash bang devices were not used in the presence of Jackie or the children."); Waller v. Citty of Danville, 212 Fed. Appx. 162, 166 (4th Cir. 2006). These cases upholding the use of flash-bang devices include cases in the Eleventh Circuit. See e.g. United States v. Baker, 16 F.3d 854, 856 (11th Cir. 1994) (finding the use of the distractionary device was appropriate where intelligence showed that the door was barricaded and two dobermans awaited inside). The Court recognizes that there is case law from other circuits holding that *under certain circumstances,* and despite the fact that a suspect was known to be armed or violent, the use of a flash bang device constitute a constitutional violation. However, those cases nearly all involve circumstances not present here; namely the presence of children, the elderly and innocent bystanders. See United States v. Jones, 214 F.3d 836, 838 (7th Cir. 2000) (finding in dicta that the use of the flash-bang device was unreasonable under the circumstances of the case because a 6-year-old child lived in the apartment); Boyd v.

Benton County, 374 F.3d 773, 779 (9th Cir. 2004) (finding that the blind deployment of a flash bang device into a dwelling where multiple innocent bystanders were suspected to be present was unreasonable). Additionally, at least one district court has held that it is unconstitutional to intentionally deploy a flash-bang device directly at a suspect. Taylor v. City of Middletown, 436 F. Supp. 2d 377, 378 (D. Conn. 2006). Accordingly, while the Court agrees that there are certain factual scenarios, not present here, where the deployment of a flash bang device could be unconstitutional, even under those sets of facts the Plaintiff has not cited to a single Eleventh Circuit case holding the use of a flash bang device to be unconstitutional. Belcher v. City of Atlanta, 30 F.3d 1390, 1400(11th Cir. 1994) (holding that non-binding authorities cannot settle the law in the Eleventh Circuit for purposes of qualified immunity). Accordingly, the Court finds that even under facts more favorable to the Plaintiff than those present here, Defendant Bruna is nonetheless entitled to qualified immunity and his motion for summary judgment must be granted on these grounds.

E. Defendants Bruna and Visners are Entitled to Qualified Immunity with Respect to the Plaintiff's Fourth Amendment Excessive Force Claims

Finally, Defendants argue that based on the undisputed facts in the record they are entitled to qualified immunity on the Plaintiffs excessive force claims. The Court agrees.

The Supreme Court held in Graham v. Connor, 490 U.S. 386 (1989), that all claims that law enforcement officers have used excessive force in the course of an arrest, or other 'seizure' of a free citizen must be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach. Graham, 490

U.S. at 395. In making the determination of reasonableness it is important that a "reviewing court judge consider the use of force 'from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight' and refrain from slipping into the role of a Monday-morning quarterback" Fernandez v. City of Cooper City, 207 F. Supp. 2d 1371, 1377 (S.D. Fla. 2002). As previously mentioned, this is because "the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain and rapidly evolving -- about the amount of force that is necessary in a particular situation." Id. (quoting Graham, 490 U.S. at 396-97). Courts are "loath to second-guess the decisions made by police officers in the field." Vaughan v. Cox, 343 F.3d 1323, 1331 (11th Cir. 2003) (citing Graham, 490 U.S. at 396-97).

This case involves the most serious kind of "seizure," that by use of deadly force. hi the Eleventh Circuit,

> "[d]eadly force is 'reasonable' for the purposes of the Fourth Amendment when an officer (1) has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others or that he has committed a crime involving the infliction or threatened infliction of serious physical harm; (2) reasonably believes that the use of deadly force was necessary to prevent escape; and (3) has given some warning about the possible use of deadly force, if feasible."

Robinson v. Arrugueta, 415 F.3d 1252, 1255 (11th Cir. 2005) (internal citations and quotations omitted). When an officer is confronted with an individual who threatens the officer with a deadly weapon, or even what the officer perceives to be a

weapon, the officer is entitled to use deadly force. See e.g. Menuel v. City of Atlanta, 25 F.3d 990, 996 (11th Cir. 1994); Linder v. Richmond County, Ga., 844 F. Supp. 764, 767 (S.D. Ga. 1994); Elliott v. Leavitt, 99 F.3d MO, 643-44 (4th Cir. 1996) ("No citizen can fairly expect to draw a gun on police without risking tragic consequences. And no court can expect any human being to remain passive in the face of an active threat on his or her life."), In this case, the testimony of the officers in the room at the time of the shooting is undisputed. The testimony is that Diotaiuto pointed his gun at the officers before the first round of shots, and despite suffering gunshot wounds during the first round of shooting, raised his gun against the officers again causing the Defendants to launch a second round of shots, causing the fatal wounds.[13] We will never know what would have occurred had the officers not shot Diotaiuto, however, as the court in Elliott held, no court should "require police officers to wait until a suspect shoots to confirm that a serious threat of harm exists." 99 F.3d at 643. Accordingly, at the time of the shooting, the Defendants conduct did not violate the decedent's constitutional rights.

Plaintiff argues, however, that the Court must look beyond the time of the shooting and consider the "totality of the circumstances," which, on her reading, would include the manner in which the Defendants executed the search warrant. The Plaintiff cites to Garrett v. Athens-Clark County, Ga., for

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[13] The Plaintiff cites to a line of cases holding that an officer may not use gratuitous force against a person who has already been subdued. See Skiritch v. Thornton, 280 F.3d 1295, 1303 (11th Cir. 2002). However, the undisputed testimony shows that Diotaiuto continued to point his gun at the Defendants even after the first round of shooting. The Court cannot hold, therefore, that the decedent had been rendered incapacitated.

the proposition that the Court must consider the "totality of the circumstances" in determining whether any Fourth Amendment violation was committed. 378 F.3d 1274, 1281 (11th Cir. 2004) ("In analyzing whether excessive force was used, courts must look at the totality of the circumstances: not just a small slice of the acts that happened at the tail of the story.").

However, the Court does not believe that Garrett stands for the proposition for which it is advanced. The "totality of the circumstances" in Garrett included the circumstances at the time of the seizure and the time immediately prior to the seizure when the police were attempting to seize Garrett. In Garrett the Eleventh Circuit noted that

> [the decedent] repeatedly placed officers' lives and innocents' lives in danger by engaging the police in a multi-county vehicle chase that did not end until [the decedent] had crashed *twice*. Once [the decedent's] truck was finally stopped, the officers tried to restrain him in a less restrictive manner (simple handcuffing), but [the decedent] ran and fought with the police and kept on violently kicking and resisting."

Garrett, 378 F.3d at 1274. However, according to Menuel v. Atlanta, 25 F.3d 990, 995 (11th Cir. 1994), an officer's pre-seizure conduct is not relevant to the determination of the officers reasonableness in utilizing deadly force. In Menuel, the court refused to consider police conduct that occurred prior to the seizure after the police pursued a course of action that was perhaps not the most prudent. Id. The Court believes, that these cases, read together, stand for the proposition that the "totality of the circumstances," which the Court is instructed to consider are the circumstances that occur during the course of the seizure and those immediately prior to the

seizure while the officers are attempting to effectuate an arrest or detention. See Scheuerman v. City of Huntsville, 499 F. Supp. 2d 1205, 1219 (N.D. Ala. 2007) ("the reasonableness inquiry depends only upon the officers knowledge of circumstances immediately prior to and at the moment he made the decision to employ deadly force."). These circumstances do not include the officers tactical plan in effecting a search warrant. No Fourth Amendment violation can occur until the time of the seizure and police conduct prior to that point should not be considered in addressing a claim of excessive force.[14] Other circuits have also adopted this rule. Waller v. Citty of Danville, 212 Fed. Appx. 162, 171 (4th Cir. 2006) (holding that pre-shooting context "is generally not relevant and is inadmissible."); Carter v. Buscher, 973 F.2d 1328, 1332 (7th Cir. 1992) ("pre-seizure conduct is not subject to Fourth Amendment scmtiny."); Whitlow v. City of Louisville, 39 Fed. Appx. 297, 303 (6th Cir. 2002) ("When analyzing claims of excessive force, this Court has adopted the view of doing so in segments."). In this

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[14] This is not to say that officers' pre-shooting behavior cannot constitute an independent constitutional violation. The Plaintiff may claim as damages all of the results proximately caused by the Defendants' pre-shooting constitutional violation, if any. Jackson v. Sauls, 206 F.3d 1156, 1168 (11th Cir. 2000) ("Although § 1983 addresses only constitutional torts, § 1983 defendants are, as in common law suits, responsible for the natural and foreseeable consequences of their actions"). "For damages to be proximately caused by a constitutional tort, a plaintiff must show that, except for that constitutional tort, such injuries and damages would not have occurred and further that such injuries and damages were the reasonably foreseeable consequences of the tortious acts or omissions in issue." Id. at 1168.

case, as in Menuel, the seizure did not happen until the time of the shooting, and accordingly because, under the "totality of the circumstances," the Defendants' conduct was reasonable at the time of the seizure, the Defendants are entitled to qualified immunity on the Plaintiffs excessive force claims. Alternatively, even if the Court were to consider Plaintiffs "totality of the circumstances", this Court might, at a Rule 50 motion, find the officers to be entitled to qualified immunity on the excessive force claims.

III. CONCLUSION

Accordingly, for the foregoing reasons, it is **ORDERED AND ADJUDGED** as follows:

1. Defendants Andre Bruna and Sean Visners' Motion for Summary Judgment [DE 143] is hereby **GRANTED in part** and **DENIED in part**;

2. Summary Judgment is granted in favor of Defendants Bruna and Visners with respect to the Plaintiff's Fourth Amendment excessive force claims;

3. Summary Judgment is granted in favor of Defendant Bruna with respect to the Plaintiff's claims relating to the improper deployment of the flash-bang device;

4. Summary Judgment is denied with respect to all claims related to the failure to knock and announce.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 13th day of May, 2008.

/s/ William P. Dimitrouleas
WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Counsel of record